Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

LEE WEATHERLY,

Petitioner,

v.

FEDERAL DEBT MANAGEMENT, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

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QUESTIONS PRESENTED

I. May a private third party who purchases a promissory note from the FDIC rely upon 12 U.S.C. § 1821(d)(14), which allows the FDIC, in its capacity as conservator or receiver of a failed bank, to commence suit on a contract within six years?

II. Whether the statute of limitations applicable to the FDIC when acting in its capacity as conservator or receiver, 12 U.S.C. § 1821(d)(14), may be transferred and assigned to private third parties who purchase notes from the FDIC?

III. Are statutes of limitation rights and privileges that may be transferred by creditors to their assignees or are statutes of limitations rights that are personal to debtors and defendants?

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OCTOBER TERM, 1993

LEE WEATHERLY,

Petitioner,

V.

FEDERAL DEBT MANAGEMENT, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

The Petitioner Lee Weatherly respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Texas Supreme Court entered in the above-entitled proceeding on March 9, 1994.

OPINIONS BELOW

The opinion of the Texas Supreme Court has not yet been reported in the official reporter as of the date of this Petition for Writ of Certiorari, but may be found at *Federal Debt Management, Inc. v. Weatherly*, 37 Tex. Sup. Ct. J. 555 (March 9, 1994). The opinion of the Texas Court of Appeals is reported at *Federal Debt Management, Inc. v. Weatherly*, 842 S.W.2d 774 (Tex. App.—Dallas 1992).

JURISDICTION

The opinion of the Texas Supreme Court was delivered on March 9, 1994, and Petitioner's motion for rehearing was denied on April 20, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTE INVOLVED

12 U.S.C. § 1821(d)(14)

(14) Statute of limitations for actions brought by conservator or receiver

(A) In general

Notwithstanding any provision of any contract, the applicable statute of limitations with regard to any action brought by the Corporation as conservator or receiver shall be—

(i) in the case of any contract claim, the longer of—

(I) the 6-year period beginning on the date the claim accrues; or

(II) the period applicable under State law; and

(ii) in the case of any tort claim, the longer of—

(I) the 3-year period beginning on the date the claim accrues; or

(II) the period applicable under State law.

STATEMENT OF THE CASE

The issue presented in this case is whether a private third party who purchases a promissory note from the FDIC may rely upon 12 U.S.C. § 1821(d)(14), which allows the FDIC, in its capacity as conservator or receiver of a failed bank, to commence suit on a contract within six years.

Respondent Federal Debt Management, Inc. ("FDM") commenced this suit on April 15, 1991, claiming to be the owner and holder of three promissory notes executed by Petitioner Lee Weatherly. The three promissory notes were executed at various times in 1986 and matured in September and November 1986. The notes were all payable to Heritage National Bank. The FDIC acquired the Weatherly notes on September 25, 1986, when it was appointed receiver for the bank. On October 27, 1989, the FDIC sold the notes to FDM. At the time that FDM acquired the notes, each note had been in default approximately three years.

More than a year elapsed before FDM filed suit to collect on the three promissory notes, and at the time suit was filed, April 15, 1991, each of the notes had been in default for slightly more than four years. Weatherly answered with an affirmative defense based on the Texas four-year statute of limitations, TEX. CIV. PRAC. & REMEDIES CODE ANN. § 16.004(a)(3), and moved for summary judgment. In its response to Weatherly's motion for summary judgment, FDM asserted for the first time that as transferee of the notes from the FDIC, it was entitled to assert a six-year statute of limitations, 12 U.S.C. § 1821(d)(14). After considering Weatherly's Motion for Summary Judgment and FDM's response, the trial court granted a take nothing judgment in favor of Weatherly.

On appeal, Texas Court of Appeals for the Fifth Supreme Judicial District of Texas (at Dallas, Texas), affirmed the judgment

in favor of Petitioner, holding that FDM is not entitled to assert the provisions of 12 U.S.C. § 1821(d)(14) and that FDM's claims were therefore barred by the Texas four-year statute of limitation. The Texas Supreme Court granted Respondent's application for writ of error and consolidated the appeal with another case, *Jackson v. Thweatt*.[1] In its opinion, the Texas Supreme Court held "that section 1821(d)(14) applies to actions brought by purchasers of assets from the FDIC to recover on those purchased assets, and that it applies retroactively to claims in existence on August 9, 1989." It is from the decision in the consolidated appeal that Petitioner seeks review by writ of certiorari.

REASONS FOR GRANTING THE WRIT

I. This Petition Raises Issues of Exceptional Importance.

This is a case of national importance. Since the rise of bank failures starting in the mid-1980's, the Federal Deposit Insurance Corporation ("FDIC") has come into possession of hundreds of thousands of promissory notes that were held by failed banks. In an effort to liquidate the assets it had acquired, the FDIC began packaging some of the notes in pools of several hundred notes each and marketing the pools to private third party investors, who hoped to gain a windfall at the expense of the FDIC and the United States taxpayers.[2] After purchasing the notes from the FDIC at a fraction of their value, the investors would then begin their attempts to collect on the notes from the original

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[1] *See, Thweatt v. Jackson*, 838 S.W.2d 725 (Tex. App.—Austin 1992), *aff'd* ___ S.W.2d ___, 37 Tex. Sup. Ct. J. 555 (March 9, 1994).

[2] A similar practice has been employed by the Resolution Trust Corporation to dispose of assets of failed savings and loans.

makers. In cases where demands were unsuccessful, the private third party purchasers would institute suit, usually in state court, to enforce their claims. Many of these suits were brought after the expiration of the applicable state statute of limitations period. When the defendants answered that the claims were limitations barred, the private party plaintiffs would argue that they were entitled to the benefits of 12 U.S.C. § 1821(d)(14), even though that section is, by its terms, expressly limited to the FDIC.

Over the past two years, numerous cases have worked their way through the lower courts, each with the issue raised in this case: whether private third parties are entitled to assert 12 U.S.C. § 1821(d)(14) to defeat defenses based on state statutes of limitations. Published cases which have addressed this issue include: *Mountain States Financial Resources Corp. v. Agrawal*, 777 F.Supp. 1550 (W.D. Okla. 1991); *Thweatt v. Jackson*, 838 S.W.2d 725 (Tex. App. — Austin 1992), *aff'd*, ___ S.W.2d ___, 37 Tex. Sup. Ct. J. 555 (March 9, 1994); *Tivoli Ventures, Inc. v. Tallman*, 852 P.2d 1310 (Colo. App. 1992), *reversed*, 870 P.2d 1244 (Colo. 1994); *Fall v. Keasler*, 1991 WL 340182 (N.D. Cal. Dec. 18, 1991); *Federal Debt Management, Inc. v. Weatherly*, 842 S.W.2d 774 (Tex. App. — Dallas 1992), *reversed*, 37 Tex. Sup. Ct. J. 555 (March 9, 1994); *White v. Moriarty*, 19 Cal. Rptr. 2d 200, 204 (Cal. Ct. App. 1993); *Martin v. Pioneer Title Co.*, 1993 WL 381101 (Idaho 4th Dist. Ct. 1993); *Cadle Co. II, Inc. v. Lewis*, 864 P.2d 718 (Kan. 1993); *Central States Resources Corp. v. First Nat. Bank in Morrill*, 501 N.W.2d 271, 278 (Neb. 1993); *FDIC v. Bledsoe*, 989 F.2d 805 (5th Cir. 1993); *Jon Luce Builder, Inc. v. First Gibraltar Bank, F.S.B.*, 849 S.W.2d 451, 455 (Tex. App.--Austin 1993, writ denied); *Cadle Co. II v. Stamm*, 1994 WL 30317 (Fla. Dist. Ct. App., February 7, 1994); and *Investment Co. of the Southwest v. Reese*, ___ P.2d ___ (N.M. April 21, 1994).

With the exception of the Texas Court of Appeals in this case, and the Colorado Court of Appeals in *Tivoli* (both of which

were later reversed), the courts have held that private third parties may invoke section 1821(d)(14), notwithstanding the plain and unambiguous language of that section limiting its application to the FDIC. These cases have ignored well-established rules of statutory construction and have instead based their result on confused notions of public policy (relying on the *D'Oench, Duhme* doctrine) and the common law of assignments (that an assignee stands in the shoes of its assignor).

This is the first case to reach the United States Supreme Court in which this issue is presented. Although the majority of lower courts that have addressed this issue have ruled in favor of the third party purchasers, given the proliferation of suits by the third party purchasers, this is an issue that should be addressed by this Court. At the present time this issue is still unresolved in forty-two states and ten federal circuits and will continue to arise until dispositively addressed by this Court.

A. 12 U.S.C. § 1821(d)(14).

In 1989, Congress passed the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), Pub. L. No. 101-73, which clarified and expanded certain powers of the FDIC. Prior to FIRREA, actions brought by the FDIC were governed by the statute of limitations applicable to the United States government generally, 28 U.S.C. § 2415, which held that an action brought by the United States or an officer or agency thereof founded on any contract must be brought within six years after the right of action accrues.

Prior to FIRREA, two circuit court decisions restricted the time in which the FDIC could bring suit under section 2415. In *FDIC v. Petersen*, 770 F.2d 141 (10th Cir. 1985), the Tenth Circuit held that the cause of action on a note accrued when the

note matured in the hands of the original assignor, regardless of when the FDIC obtained the note. The effect of this decision was to allow the FDIC, which may have acquired some notes in various degrees of default, substantially less than the six years normally allowed the government to bring suit. In *FDIC v. Hinkson*, 848 F.2d 432, 433 (3rd Cir. 1988), the Third Circuit held that the FDIC was limited to bringing suits within the six-year period set forth in section 2415 and could not avail itself of the longer limitations period under state law.[3] The new statute of limitations in FIRREA drafted especially for the FDIC, 12 U.S.C. § 1821(d)(14), resolves the conflict between the Third and Tenth Circuits by providing that the six year period commences upon the appointment of the FDIC as conservator or receiver and allows the FDIC the benefit of the state statute of limitations, if the state statute is longer than six years.[4]

The Texas Supreme Court incorrectly concluded that section 1821(d)(14) creates a "right" in the FDIC to bring suit within six years. It therefore reasoned that since under the common law of assignments an assignee stands in the shoes of its assignor, a private third party who purchases assets from the FDIC is entitled to the same privileges and immunities as the FDIC. The

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[3] Contrary to *Petersen*, *Hinkson* holds that limitations under section 2415 does not commence to run against the FDIC until the FDIC acquires the note.

[4] Some courts have incorrectly reasoned that section 1821(d)(14) extends the period of time in which the FDIC may bring suit. However, without the restrictions imposed by either 28 U.S.C. § 2415 or 12 U.S.C. § 1821(d)(14), the FDIC would have an unlimited time to bring suit. *United States v. Summerlin*, 310 U.S. 414, 416, 60 S.Ct. 1019, 1020, 84 L.Ed. 1283 (1940); *FDIC v. Hinkson*, 848 F.2d 432, 433 (3rd Cir. 1988). Although section 1821(d)(14) operates in some instances to expand the time in which the FDIC may bring suit over section 2415, it nevertheless is a major restriction on the otherwise unlimited right of the sovereign to bring suit.

fundamental flaw in the Court's logic is its conclusion that section 1821(d)(14), which is clearly a statute of limitations, creates "a right transferable to subsequent purchasers." The title of the section identifies it as a statute of limitations applicable to the FDIC acting as conservator or receiver[5] and the plain language of the statute identifies the FDIC acting in its capacity as conservator or receiver as the only party governed by the section. Incredibly, the Texas Supreme Court states that its holding is consistent with the plain language of the statute:

> This reading does not contravene the plain language of the statute. Although section 1821(d)(14) does not expressly create a special limitations rule for transferees, it unquestionably does so for the FDIC. The FDIC, as possessor of this right, may transfer it incident to the asset to which the limitations period relates. Thus, while the statute alone might not vest any rights in transferees, the statute combined with the common law of assignment does. . . .

This "right" in the transferees of the FDIC is not created by FIRREA, the common law of assignments, or the combination of both—instead it is manufactured out of thin air by the Texas Supreme Court. The statute is silent as to any party other than the FDIC (in its capacity as conservator or receiver). The common law of assignments therefore does not support the assignment of rights, privileges, and immunities of the sovereign to private parties acting for their own benefit.

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[5] The caption of Section 1821(d)(14) reads: "Statute of Limitations for actions brought by conservator or receiver." This appears to be a reliable indication that Congress intended this section to operate as a statute of limitations instead of as a "right" that may be assigned or transferred.

B. Judicial Construction of Statutes of Limitation.

The primary purpose of statutes of limitation is to compel the exercise of a right of action within a reasonable time so that the opposing party has a fair opportunity to defend. Statutes of limitation are founded upon the general experience of mankind that claims which are valid are not usually allowed to remain neglected if the right to sue thereon exists. Statutes of limitation are designed to prevent undue delay in bringing suit on claims and to suppress fraudulent and stale claims from being asserted, to the surprise of the parties or their representatives, when all the proper vouchers and evidence are lost, or the facts have become obscure from the lapse of time or the defective memory or death or removal of witnesses. 51 Am.Jur.2d *Limitation of Actions* § 17, p. 602 (1970). Statutes of limitation "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Burnett v. New York Central R. Co.*, 380 U.S. 424, 428, 85 S.Ct. 1050, 1054, 13 L.Ed.2d 941 (1965).[6] A judicial interpretation that allows private third parties to assert a state law claim founded on contract beyond the time allowed by a state statute of limitations only frustrates the reasonable commercial expectations of the parties involved.

Another problem arises when the state courts are unable to filter the stale suits through the use of state statutes of limitation. The elapse of an extended period of time makes it more complicated for the third party purchasers from the FDIC to prove

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[6] Quoting from *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348-49, 64 S.Ct. 582, 586, 88 L.Ed. 788.

their case. For example, the holder of a note is under a burden to prove what amounts are due under the note and in many instances the only evidence available consists of hearsay bank records that were generated several years earlier. The lack of availability of witnesses to verify these records makes proof in these note cases substantially more difficult, thereby clogging already cluttered judicial dockets. The application of the state statute of limitations has the salutary effect of removing unnecessary clutter and stale claims from court dockets. As this Court has noted, "courts ought to be relieved of the burden of trying stale claims when a plaintiff has slept on his rights." *Burnett*, 380 U.S. at 428, 85 S.Ct. at 1054.

II. The Decision of the Texas Supreme Court Conflicts With Decisions of the Third Circuit Court of Appeals and the United States Supreme Court.

The Texas Supreme Court erred in holding that statutes of limitation are rights that may be transferred between plaintiffs and that an assignee is entitled to the benefits of the same limitations period as its assignor. This holding is in direct conflict with the opinion of the Third Circuit Court of Appeals in *FDIC v. Hinkson*, 848 F.2d 432 (3rd Cir. 1988).

In *Hinkson*, a pre-FIRREA case, the FDIC brought suit on a note that it had received by assignment after the federal statute of limitations had lapsed but within the time allowed by state law. Under Delaware law, which would have applied had the suit been between private parties, a note under seal was governed by a twenty-year statute of limitations. The Third Circuit rejected the FDIC's argument that because of the assignment, it enjoyed the same rights any other assignee would have to bring suit within twenty years, holding that the FDIC was bound by the provisions

of section 2415 limiting it to six years to bring an action. The Third Circuit noted that prior to the enactment of section 2415, the FDIC would have had an unlimited time to bring suit, even more than the twenty years permitted by Delaware law. The opinion of the Texas Supreme Court in the present case is squarely in conflict with the Third Circuit's holding in *Hinkson* that an assignee is not governed by the same statue of limitations that applied to its assignor. Because the FDIC was bound in *Hinkson* to bring its contract claims within the six year period mandated by 28 U.S.C. § 2415 and was prohibited from asserting the longer state statute of limitations that applied to its predecessor in interest, it follows that an assignee of the FDIC (as in the present case) is bound to assert its claims within the period mandated by state law and not within the longer period mandated by 12 U.S.C. § 1821(d)(14), which is limited by its express terms to actions commenced by the FDIC.

In fact, statutes of limitation have never been treated as rights of plaintiffs—instead courts have uniformly held that statutes of limitation are personal to defendants and do not confer any right of action, but are enacted to restrict the period of time within which the right, otherwise unlimited,[7] might be asserted. 54 C.J.S. *Limitations of Actions*, § 3, pp. 17-18 (1977), *citing*, *American Nat. Ins. Co. v. Hicks*, 35 S.W.2d 128, 130 (Tex. Comm'n App. 1931, judgm't adopted). *See also*, 51 Am.Jur.2d *Limitation of Actions* § 20 (1970). The Texas Supreme Court incorrectly assumes that section 1821(d)(14) creates a right in the FDIC by giving it six years in which to bring suit. Without the restrictions imposed by either 28 U.S.C. § 2415 or 12 U.S.C. § 1821(d)(14), the FDIC would have an unlimited time to bring suit.

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[7] At common law, there was no fixed time for the bringing of actions. A cause of action, once matured, lasted forever. "Limitations are created by statute and derive their authority therefrom; they are legislative and not judicial acts." 54 C.J.S. *Limitations of Actions* § 2, p. 17 (1977).

United States v. Summerlin, 310 U.S. 414, 416, 60 S.Ct. 1019, 1020, 84 L.Ed. 1283 (1940); *FDIC v. Hinkson, supra*. The FDIC is an agency of the federal government. *Hinkson, supra*. Statutes of limitation do not run against the rights of the public. 54 C.J.S. *Limitations of Actions* § 16 (1977). Consequently, unless it is expressly provided by constitution or statute, statutes of limitation do not run against the federal government or an agency thereof. 54 C.J.S. *Limitations of Actions* § 17 (1977).

Section 1821(d)(14) is a limitation on the unlimited right of the United States government to bring suit on its claims and the government's immunity from the operation of state statutes of limitation. The immunity of the United States (or the FDIC) from the operation of statutes of limitation applies to a note or claim which is acquired by the United States (or the FDIC) through transfer or assignment even though the statute had commenced to run before the acquisition. *United States v. Dobbins*, 139 F.2d 169 (5th Cir. 1943). This sovereign immunity from application of statutes of limitation does not extend to assignees or transferees of the sovereign who seek to enforce rights purely for their private benefit. *Cressey v. Meyer*, 138 U.S. 525, 11 S.Ct. 387, 34 L.Ed. 1018 (1891); *Shumway v. State*, 163 P.2d 274 (Ariz. 1945); *Brookfield v. Rock Island Improvement Co.*, 169 S.W.2d 662, 665 (Ark. 1943); 54 C.J.S. *Limitations of Actions* § 20 (1977); 27 Am.Jur.2d *Equity* § 156.

In *Cressey v. Meyer*, William Cressey, an alien, commenced suit in a United States circuit court against the stockholders of a failed bank to recover payments due him under bonds issued by the state in connection with the capitalization of the bank. Cressey amended his suit to add the stockholders of the bank, seeking to charge these stockholders for the amounts they owed the state pursuant to an earlier settlement with the state. Subsequently the State of Louisiana intervened in the suit. After the trial court sustained the defenses of the stockholders, Cressey

appealed. The United States Supreme Court, on appeal, noted that the case was an action by a creditor of the state, "not against his debtor [the state], but against [the state's] debtors, to secure an appropriation of their debts to [the state] to the satisfaction of [the state's] obligations to him. It is a proceeding of a garnishee nature." 11 S.Ct. at 388. Cressey's suit was commenced some nineteen years after the last payment was due under the settlement between the stockholders and the state. Affirming the judgment of the trial court, the United States Supreme Court noted that although limitations and laches did not run against the sovereign, "that right is personal to the sovereign; it does not pass to any of its creditors; and its intervention and appearance in a suit brought by a creditor, as against its debtors, does not give to such creditor its sovereign exemption from liability to the statute of limitation and the defense of laches." 11 S.Ct. at 388. *Cressey* demonstrates the fallacy behind the Texas Supreme Court's reliance on "the common law of assignments." Personal rights of the sovereign, such as immunity from the application of state statutes of limitation or the doctrine of laches, do not pass to assignees of the sovereign or to private parties attempting to enforce rights of the sovereign for their own benefit. Because private parties do not enjoy immunity from the bar of state statutes of limitation, and because private parties do not receive the sovereign's immunity simply through assignment of claims, then application of section 1821(d)(14) to suits brought by private parties runs contrary to the purposes behind the federal statute of limitation, which is not to extend the time for the sovereign to act, but to restrict it.

III. The Texas Supreme Court Has Incorrectly Decided An Important Question Of Federal Law Which Has Not, But Should Be, Settled By this Court.

A private third party who purchases a promissory note from the FDIC may not take advantage of 12 U.S.C. §

1821(d)(14), which allows only the FDIC, in its capacity as conservator or receiver of a failed bank, to commence suit on a contract within six years. The language of section 1821(d)(14) is clear and unambiguous. The six-year statute of limitations applies only to actions "brought by *[the FDIC]* as conservator or receiver." 12 U.S.C. § 1821(d)(14) (emphasis added). Assignees of the FDIC are not covered by the express and unambiguous terms of the statute.

A. Rules Of Statutory Construction.

The starting point in any case of statutory construction is the statute itself. *Demarest v. Manspeaker*, 498 U.S. 184, 111 S.Ct. 599, 602, 112 L.Ed.2d 608 (1991). Section 1821(d)(14) is expressly limited to actions brought by the FDIC as conservator or receiver:

> **(14) Statute of limitations for actions brought by conservator or receiver**
>
> **(A) In general**
>
> Notwithstanding any provision of any contract, the applicable statute of limitations with regard to *any action brought by the Corporation as conservator or receiver* shall be—
>
> **(i)** in the case of any contract claim, the longer of—
>
> **(I)** the 6-year period beginning on the date the claim accrues; or
>
> **(II)** the period applicable under State law; and
>
> **(ii)** in the case of any tort claim, the longer of—
>
> **(I)** the 3-year period beginning on the date the claim accrues; or

(II) the period applicable under State law.

[Emphasis added]. The "Corporation" referred to in Section 1821(d)(14) is the Federal Deposit Insurance Corporation. *See*, 12 U.S.C. § 1811. Nowhere does Section 1821(d)(14) provide that assignees or transferees of assets held by the FDIC are entitled to assert the six-year period of limitations for contract claims. The conclusion that third-party assignees of the FDIC may assert section 1821(d)(14) can only be reached through convoluted reasoning that ignores the plain meaning of the statute. Where statutes are silent or have omitted to add a class or category, courts are not free to expand the scope of that statute through the guise of statutory construction. *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83, 111 S.Ct. 1138, 113 L.Ed.2d 68; *Demarest v. Manspeaker*, 498 U.S. 184, 111 S.Ct. 599, 112 L.Ed.2d 608 (1991); *Iselin v. United States*, 270 U.S. 245, 250-51, 46 S.Ct. 248, 70 L.Ed. 566 (1926). Statutes of limitations are created by Congress and the state legislatures, not by the courts. Courts are not free to rewrite statutes enacted by Congress and, where the statute is unambiguous and Congressional intent is clear from the face of the statute, the plain language should be followed by the courts. The language of 12 U.S.C. § 1821(d)(14) is clear —the six year statute of limitations for contractual claim applies only in actions "brought by the [FDIC] as conservator or receiver." If Congress had intended a broader application of the six year statute of limitations, it could easily have drafted the statute to include purchasers of assets from the FDIC. It did not.

Courts are not at liberty to amend or repeal a statute under the guise of construction, nor is it within the judicial function of a court to supply omissions in a statute, even though that which was omitted may have been omitted by oversight or inadvertence. It is not for a court to extend the scope of a statute beyond the point where Congress indicated it would stop. *In re Shear*, 139

F.Supp. 217, 221 (N.D. Cal. 1956). In *Iselin v. United States*, 270 U.S. 245, 250-51, 46 S.Ct. 248, 70 L.Ed. 566 (1926), Justice Brandeis rejected an argument attempting to expand a taxation statute based upon omissions in the statute:

> [The statute's] language is plain and unambiguous. What the Government asks is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope. To supply omissions transcends the judicial function.

Congress's intent to limit the applicability of 12 U.S.C. § 1821(d)(14) to the FDIC could not be any clearer; there is no room to expand that statute through judicial construction to include within its ambit private third parties.

B. While courts may have extended rights arising under common law to transferees of assets of the FDIC, courts have not extended rights arising under federal statutes to transferees from the FDIC.

In its opinion, the Texas Supreme Court analogizes its application of section 1821(d)(14) to those cases where the FDIC's rights under 12 U.S.C. § 1823(e) have been extended to subsequent purchasers.[8] The flaw in the Texas Supreme Court's analysis is its failure to distinguish between rights arising under federal common law and rights arising under federal statutory law.

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[8] The most commonly-used argument for extending Section 1821(d)(14) to assignees of the FDIC has been the analogy to cases that have extended the *D'Oench* and federal holder in due course doctrines to assignees of the FDIC. Several courts have stated that FIRREA evidences Congressional intent to extend rights of the FDIC to its assignees to the fullest extent permissible.

This argument is aided by sloppy opinions written by lower courts that either are ignorant of the development of this area of the law or are too pressed by time to accurately set the law forth. In order to demonstrate the flaw in the Texas Supreme Court's analogy, it is necessary to examine the growth of the *D'Oench* and federal holder in due course doctrines.

The *D'Oench* doctrine originated in the case *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 62 S.Ct. 676, 86 L.Ed. 956 (1942). In *D'Oench*, the appellant had given a promissory note to a bank with the understanding that the note was only to enhance the assets of the bank and that the bank would never attempt to collect the note. The FDIC later acquired the note as collateral for a loan it made to the bank and brought suit to collect the note. In defense to the FDIC's suit, the maker, D'Oench, Duhme & Co., asserted its agreement with the bank that the note would never be enforced. The Supreme Court rejected D'Oench's argument and held that the secret agreement could not be a defense to the FDIC's suit because it would tend to deceive federal banking authorities who, given their responsibility to protect the fiscal stability of financial institutions, must be able to evaluate a given bank's true assets and commitments.

In 1950, Congress codified the *D'Oench* doctrine in 12 U.S.C. § 1823(e), a statute that originally applied only to the FDIC acting in its corporate capacity. *Bell & Murphy and Associates v. Interfirst Bank Gateway, N.A.*, 894 F.2d 750, 753 (5th Cir. 1990). Prior to the enactment of FIRREA in 1989, the FDIC, when acting in its capacity as conservator or receiver, did not enjoy the protection of Section 1823(e). As a result, various courts expanded the common law *D'Oench* doctrine to protect the FDIC in its receivership capacity, holding that Section 1823(e) did not preempt expansion of the common law doctrine. *FDIC v. McClanahan*, 795 F.2d 512, 514, n. 1 (5th Cir. 1986); and *Beighley v. FDIC*, 868 F.2d 776 (5th Cir. 1989). Subsequently,

the common law *D'Oench* doctrine was even extended to the FSLIC (which never enjoyed the statutory protection of Section 1823(e) in any capacity). *See*, *FSLIC v. Kroenke*, 858 F.2d 1067 (5th Cir. 1988); *FSLIC v. Lafayette Investment Properties, Inc.*, 855 F.2d 196 (5th Cir. 1988); and *FSLIC v. Murray*, 853 F.2d 1251 (5th Cir. 1988). Eventually, the common law *D'Oench* doctrine was extended to entities that acquired assets from the FDIC or the FSLIC. *Bell & Murphy and Associates*, *supra*; *Porras v. Petroplex Savings Ass'n*, 903 F.2d 379 (5th Cir. 1990).

In 1989, the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA") extended the statutory protection to the FDIC in whatever capacity it acts (*see*, 12 U.S.C. § 1823(e)) and to bridge Banks (12 U.S.C. § 1821(n)(4)(I)). However, FIRREA did not extend the statutory protection of Section 1823(e) to third party purchasers of assets from the FDIC. Historically, it has been the common law *D'Oench* doctrine and the common law holder in due course doctrine that were extended to protect entities not otherwise entitled to statutory protection of Section 1823(e).[9]

The federal holder in due course doctrine is a common law extension of the *D'Oench,* doctrine and has similar, but not identical elements. The federal holder in due course doctrine originated in the Eleventh Circuit in *Gunter v. Hutcheson*, 674 F.2d 862 (11th Cir. 1982), and was eventually adopted by the Fifth Circuit in *FSLIC v. Murray*, 853 F.2d 1251 (5th Cir. 1988).

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[9] Before FIRREA, the statutory protection applied to the FDIC in its corporate capacity only, but FIRREA expanded the scope of Section 1823(e) to include FDIC in its receivership or conservatorship capacities. FIRREA has also extended that statutory protection to bridge banks in Section 1821(n)(4)(I), which contains language that is virtually identical to Section 1823(e). If Congress had intended for FDIC's statutory rights to automatically flow to bridge banks, then Section 1821(n)(4)(I) would have been unnecessary.

The federal holder in due course doctrine evolved as a complement to the *D'Oench* doctrine because the FDIC typically does not enjoy holder in due course status under state law. *FDIC v. Wood*, 758 F.2d 156, 158 (6th Cir. 1985). Although the holder in due course doctrine has been codified as state law under the Uniform Commercial Code, there is no statutory federal holder in due course scheme. The practical effect of the federal holder in due course doctrine is that it dispenses with the exceptions to holder in due course status where the FDIC acquires the instrument as part of taking over an estate or as part of a bulk transaction. *See*, TEX. BUS. & COM. CODE ANN. § 3.302. Otherwise, the federal courts are attempting to fashion federal holder in due course protection along U.C.C. lines. *Sunbelt Savings, FSB Dallas, Texas v. Montross*, 923 F.2d 353, 356 (5th Cir. 1991) *rev'd on other grounds and remanded*, 944 F.2d 227 (5th Cir. 1991) (en banc). Extension of the common law federal holder in due course doctrine does not support the Texas Supreme Court's decision extending statutory rights beyond the ambit delineated by Congress.

Cases that extend the protection of Section 1823(e) to transferees of the FDIC should be read carefully, especially in light of the historical development of the *D'Oench* doctrine. In cases where the courts have extended Section 1823(e), the extension is coupled with the common law *D'Oench* doctrine, indicating that the courts either fail to grasp the distinction between statutory and common law rights or that they simply do not care since the outcome under either scheme is the same.

C. No Congressional Intent To Extend Rights To Assignees.

One of the clearest manifestations in FIRREA of Congressional intent to limit the application of section 1821(d)(14) to the FDIC is found at 12 U.S.C. § 1823(d)(3)(A), which expressly extends the "rights, privileges, and authorities of the

Corporation as receiver under sections 1821 and 1825(b)" to the FDIC when it is acting in its corporate capacity. Implicit in this section is Congress' recognition that section 1821(d)(14) does not by itself extend to entities other than those mentioned therein.[10]

A careful examination of the statutory scheme, including provisions of FIRREA relating to bridge banks, further reveals that Congress did not intend to extend rights that are unique to the FDIC to the FDIC's assignees. When Congress enacted FIRREA in 1989, it authorized the FDIC to transfer assets of insolvent banks to "bridge banks," which would assume certain assets and liabilities of an insolvent bank. Bridge banks are used as an alternative to straight liquidation of an insolvent bank by the FDIC. The statutory vehicle creating bridge banks is 12 U.S.C. § 1821(n), which allows the Comptroller of the Currency to charter national banks as bridge banks. Section 1821(n) allows bridge banks to assume the deposits and liabilities of banks that are in default from the FDIC. In addition to those privileges normally enjoyed by national banks, Section § 1821(n) expands the rights of bridge banks by endowing them with certain powers similar to those of the FDIC. For example, when the FDIC becomes a party to a suit, it is entitled to apply for a suspension of the action for either a 45 or 90 day period. 12 U.S.C. § 1821(d)(12). When a bridge bank becomes a party to a suit by virtue of its acquisition of any assets or liabilities of a bank in default, it may request a 45 day suspension of the action. 12 U.S.C. § 1821(n)(4)(I).

Although bridge banks share certain powers of the FDIC, those powers are not coextensive. For example, actions involving bridge banks do not arise under the laws of the United States and bridge banks may not normally remove cases to federal court. *Cf.*,

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[10] See also 12 U.S.C. § 1441a(b)(1)(B) which makes gives the Resolution Trust Corporation the same agency status as the FDIC when it is acting as a conservator or receiver of an insured depository institution.

12 U.S.C. § 1819(b). In fact, Congress has declared that bridge banks are not agencies, establishments, or instrumentalities of the United States. 12 U.S.C. § 1821(n)(6). There is no statutory provision granting bridge banks the power to avoid fraudulent transfers, although section 1821(d)(17) grants that power to the FDIC. And, significantly, there is no statute of limitations that expressly applies to actions brought by bridge banks. Congress contemplated the use of bridge banks as an alternative to FDIC liquidation of insolvent banks and gave bridge banks specific powers that are unique to the FDIC. In those instances where Congress did not give bridge banks rights similar to the FDIC, it is apparent that Congress did not intend for bridge banks to exercise those rights. *See Demarest v. Manspeaker*, 498 U.S. 184, 111 S.Ct. 599, 112 L.Ed.2d 608 (1991).

Congress also clearly contemplated the FDIC's use of the private sector in carrying out its duties of liquidating insolvent banks:

> (K) Utilization of private sector. In carrying out its responsibilities in the management and disposition of assets from insured depository institutions, as conservator, receiver, or in its corporate capacity, the Corporation shall utilize the services of private persons, including real estate and loan portfolio asset management, property management, auction marketing, and brokerage services, if such services are available in the private sector and the Corporation determines utilization of such services is practicable, efficient, and cost effective.

12 U.S.C. § 1821(d)(2)(K). If Congress had intended for the private sector to enjoy the same privileges and projections as the FDIC, it easily could have added statutory provisions similar to

those relating to bridge banks. Because Congress did not enact legislation affecting the rights and projections of transferees of assets from the FDIC, as it did with bridge banks, it follows that Congress did not intend for the private sector assignees to have powers coextensive with the FDIC's statutory powers.

CONCLUSION

For these various reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

THE SUPREME COURT OF TEXAS

No. D-3057

CORDUS JACKSON, JR., PETITIONER

v.

GARY THWEATT, RESPONDENT

ON APPLICATION FOR WRIT OF ERROR TO THE
COURT OF APPEALS FOR THE THIRD DISTRICT OF TEXAS

-- consolidated with --

No. D-3437

FEDERAL DEBT MANAGEMENT, INC., PETITIONER

v.

LEE WEATHERLY, RESPONDENT

ON APPLICATION FOR WRIT OF ERROR TO THE
COURT OF APPEALS FOR THE FIFTH DISTRICT OF TEXAS

CHIEF JUSTICE PHILLIPS delivered the opinion of the Court in which all JUSTICES join. JUSTICE ENOCH not sitting.

Under 12 U.S.C. § 1821(d)(14), the FDIC has six years to bring suit on delinquent notes acquired from a failed bank. The issue presented in these consolidated cases is whether purchasers of such notes from the FDIC obtain the benefit of this federal limitations period. Because we conclude that they do, we affirm the judgment of the court of appeals in *Jackson v. Thweatt*, 838 S.W.2d 725, and reverse the judgment of the court of appeals in *Federal Debt Management, Inc. v. Weatherly*, 842 S.W.2d 774. Both causes are remanded to the trial court for further proceedings.

I

Jackson v. Thweatt

Cordus Jackson, Jr. executed a promissory note to the People's National Bank of Lampasas in January 1984, which he failed to pay when it became due on May 3, 1984. The Federal Deposit Insurance Corporation ("FDIC") became the owner and holder of the note on April 18, 1985, when it was appointed receiver for the bank. On December 28, 1988, the FDIC sold the note to Gary Thweatt.

Thweatt sued Jackson on the note on April 15, 1991. The trial court granted Jackson's subsequent motion for summary judgment based on the four-year limitations period set forth in Tex. Civ. Prac. & Rem. Code § 16.004. The court of appeals reversed, concluding that, because Thweatt acquired the note from the FDIC, the suit was governed by the six-year limitation period set forth in 12 U.S.C. § 1821(d)(14). 838 S.W.2d at 728. As this limitation period did not begin running until April 18, 1985, when the FDIC was appointed receiver, Thweatt's suit was held to be timely.

Federal Debt Management, Inc. v. Weatherly

Lee Weatherly defaulted on three promissory notes payable to Heritage National Bank maturing between September and November, 1986. The FDIC acquired the Weatherly notes on September 25, 1986, when it was appointed receiver for the bank. On October 27, 1989, it sold the notes to Federal Debt Management, Inc.[11] Federal Debt Management sued Weatherly on the notes on April 15, 1991. As in *Thweatt*, the trial court granted summary judgment for the defendant based on the Texas four-year statute of limitations. The court of appeals affirmed, concluding that the six-year limitations period under 12 U.S.C. § 1821(d)(14) did not apply to actions filed by assignees of the FDIC. 842 S.W.2d at 779.

The courts of appeals in *Thweatt* and *Weatherly* thus reached opposite conclusions on this important issue. We granted both applications for writ of error to resolve this conflict.

II

12 U.S.C. § 1821(d)(14) provides as follows:

(A) In general

> Notwithstanding any provision of any contract, the applicable statute of limitations with regard to any action brought by the Corporation[12] as conservator or receiver shall be--

---

[11] Federal Debt Management is a Texas corporation engaged in the business of purchasing notes from the FDIC and the Resolution Trust Corporation.

[12] "Corporation" in this statute refers to the FDIC. 12 U.S.C. § 1811.

> (i) in the case of any contract claim, the longer of--
>
> (I) the 6-year period beginning on the date the claim accrues; or
> (II) the period applicable under State law. . . .
>
> (B) Determination of the date on which a claim accrues
>
> For purposes of subparagraph (A), the date on which the statute of limitation begins to run on any claim described in such subparagraph shall be the later of--
>
> (i) the date of appointment of the Corporation as conservator or receiver; or
> (ii) the date on which the cause of action accrues.

This provision was enacted in 1989 as part of the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA), Pub. L. No. 101-73, § 212(d)(14), 103 Stat. 183, 232-33 (1989).[13]

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[13] Before 1989, claims brought by the FDIC were governed by 28 U.S.C. § 2415(a), the limitations period applicable to the federal government generally. That section provides in relevant part as follows:

> (a) Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof, which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues. . .

Jackson and Weatherly do not dispute that the collection suits against them would be timely if governed by section 1821(d)(14). They argue, however, that this provision applies only to actions brought by the FDIC, not to actions brought by the FDIC's successors in interest. Additionally, Jackson argues that section 1821(d)(14) does not apply retroactively to claims arising before FIRREA's enactment.

A

Section 1821(d)(14) expressly refers only to actions "brought by the [FDIC]."[14] The court of appeals in *Weatherly*, as

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26 U.S.C. § 2415(a). Courts construing this provision have split as to when the six year limitations period begins to run. *Compare, e.g., FDIC v. Hinkson*, 848 F.2d 432, 434-35 (3rd Cir. 1988)(limitations does not begin to run until the FDIC acquires the claim), *with FDIC v. Belli*, 981 F.2d 838, 840 (5th Cir. 1993)(limitations begins to run when the claim could have first been sued upon, even if the FDIC had not yet acquired the cause of action). FIRREA resolved this issue by providing that limitations begins to run, at the earliest, when the FDIC acquires the claim. § 1821(d)(14)(B). Also, FIRREA allows the FDIC to take advantage of state limitations if it is longer than six years, whereas courts construing section 2415(a) concluded that it completely superseded state limitations. *See, e.g., Hinkson*, 848 F.2d at 434.

[14] Although the language of the statute is actually limited to "actions brought by the [FDIC] as *conservator or receiver*," it is made expressly applicable to the FDIC in its corporate capacity pursuant to 12 U.S.C. § 1823(d)(3)(A), which provides:

> IN GENERAL.--With respect to any asset acquired or liability assumed pursuant to this section, the Corporation shall have all of the rights, powers, privileges, and authorities of the Corporation as receiver under sections 1821 and 1825(b) of this title.

See FDIC v. Howse, 736 F.Supp. 1437, 1445 (S.D. Tex. 1990).

well as the dissent in *Thweatt*, concluded that the language of this statute is plain and, regardless of policy considerations, could not be construed as applying to actions brought by *assignees* of the FDIC. We conclude, however, that the FDIC's successors in interest are entitled to the benefits of section 1821(d)(14) pursuant to the common law maxim that "[a]n assignee stands in the shoes of his assignor." *FDIC v. Bledsoe*, 989 F.2d 805, 810 (5th Cir. 1993); *see also* 6A C.J.S. Assignments, §§ 76-77 (1975).

The Uniform Commercial Code incorporates this rule with regard to promissory notes:

> (a) Transfer of an instrument vests in the transferee such rights as the transferor has therein, except that a transferee who has himself been a party to any fraud or illegality affecting the instrument or who as a prior holder had notice of a defense or claim against it cannot improve his position by taking from a later holder in due course.

Tex. Bus. & Com. Code § 3.201(a) (Tex. UCC) (Vernon 1968). The policy underlying this rule "is to assure the holder in due course a free market for the paper." § 3.201 comment 3. This policy is particularly compelling with regard to notes acquired by the FDIC from an insolvent banking institution and sold to third parties pursuant to a purchase and assumption transaction. One of FIRREA's purposes was to "provide funds from public and private sources to deal expeditiously with failed depository institutions." Pub. L. No. 101-73, § 101(8). If the FDIC's statute of limitations did not enure to the benefit of its transferees, the market value of notes and other assets in the hands of the FDIC would be diminished, hindering this statutory purpose. As noted in *Fall v. Keasler*, 1991 WL 340182, at *4 (N.D. Cal. Dec. 18, 1991):

> To hold that assignees are relegated to the state

> statute of limitations would serve only to shrink the private market for the assets of failed banks. It would require the FDIC to hold onto and prosecute all notes for which the state statute of limitations has expired because such obligations would be worthless to anyone else. This runs contrary to the policy of allowing the FDIC to rid the federal system of failed bank assets. The FDIC can only make full use of the market in discharging its statutory responsibilities if the market purchasers have the same rights to pursue actions against recalcitrant debtors as does the FDIC.

See also Brian J. Woram, *FIRREA's Statutes of Limitations: Their Availability to Purchasers From the FDIC*, 110 Banking L.J. 292 (1993) (concluding that FIRREA limitations should be extended to subsequent purchasers); James J. Boteler, Comment, *Protecting the American Taxpayers: Assigning the FDIC's Six Year Statute of Limitations to Third Party Purchasers*, 24 Tex. Tech L. Rev. 1169, 1200 (1993) (same).

Because of this strong policy rationale, and in accordance with the principle that an assignee receives the full rights of the assignor, most courts have interpreted section 1821(d)(14), as well as the predecessor limitations provision in 28 U.S.C. §2415(a), as extending to purchasers from the FDIC. *See Jon Luce Builder, Inc. v. First Gibraltar Bank, F.S.B.*, 849 S.W.2d 451, 455 (Tex. App.--Austin 1993, writ denied); *Pineda v. PMI Mortgage Ins. Co.*, 843 S.W.2d 660, 669 (Tex. App.--Corpus Christi 1992), *writ denied*, 851 S.W.2d 191 (Tex. 1993); *Bledsoe*, 989 F.2d at 810; *Fall v. Keasler*, 1991 WL 340182, at *2-3; *Mountain States Financial Resources v. Agrawal*, 777 F.Supp. 1550, 1552 (W.D. Okl. 1991), *White v. Moriarty*, 19 Cal. Rptr. 2d 200, 204 (Cal. Ct. App. 1993); *Martin v. Pioneer Title Co.*, 1993 WL 381101, at *2-3 (Idaho 4th Dist. Ct. 1993); *Cadle Co. II, Inc. v. Lewis*, 864

P.2d 718 (Kan. 1993); *Central States Resources Corp. v. First Nat. Bank in Morrill*, 501 N.W.2d 271, 278 (Neb. 1993). *But see Tivoli Ventures, Inc. v. Tallman*, 852 P.2d 1310, 1313 (Colo. App. 1992).

This reading does not contravene the plain language of the statute. Although section 1821(d)(14) does not expressly create a special limitations rule for transferees, it unquestionably does so for the FDIC. The FDIC, as possessor of this right, may transfer it incident to the asset to which the limitations period relates. Thus, while the statute alone might not vest any rights in transferees, the statute combined with the common law of assignment does. As the Fifth Circuit noted in *Bledsoe*, "[a]s the statute at hand is silent as to the rights of assignees, we turn to the common law to fill the gap." 989 F.2d at 810.

An analogy may be drawn to the FDIC's special rights under 12 U.S.C. § 1823(e). This provision essentially codifies the holding of *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942), in which the Supreme Court ruled that unrecorded agreements that tend to mislead banking examiners cannot be raised as a defense against the FDIC. *See Kilpatrick v. Riddle*, 907 F.2d 1523, 1526 (5th Cir. 1990); *FDIC v. Newhart*, 892 F.2d 47, 49 (8th Cir. 1989); *see also* Peter G. Weinstock and Christopher T. Klimko, *Banking Law*, 45 Sw. L.J. 1, 12 (1991). Although section 1823(e) also expressly applies only to the FDIC, its protection has generally been extended to purchasers of assets from the FDIC. *See, e.g., Victor Hotel Corp. v. F.C.A. Mortgage Corp.*, 928 F.2d 1077, 1083 (11th Cir. 1991); *FDIC v. Newhart*, 892 F.2d 47, 50 (8th Cir. 1989); *Fleet Bank of Maine v. Steeves*, 785 F.Supp. 209, 213-15 (D. Me. 1992); *CMF Virginia Land, L.P. v. Brinson*, 806 F.Supp. 90, 93 (E.D. Va. 1992); *Alarcon v. Williams*, 772 F.Supp. 334, 342 (E.D. Mich. 1991); *B.L. Nelson and Assocs. v. Sunbelt Sav.*, 733 F.Supp. 1106, 1112 (N.D. Tex. 1990). This extension is likewise founded on the policy that, for assets to be marketable in the hands of the FDIC, its protections

must be available to purchasers. *See Newhart*, 892 F.2d at 49-50; *Brinson*, 806 F.Supp. at 93; *Alarcon*, 772 F.Supp. at 343-44.

Jackson and Weatherly would dismiss this analogy because section 1823(e) is merely a statutory parallel of the common law *D'Oench Duhme* doctrine. Courts are free to extend a common law right, they contend, but not one that arises by statute, such as limitations. If Congress had intended subsequent purchasers to benefit from section 1821(d)(14), the argument goes, Congress would have expressly said so.

The cases cited above, however, have extended not only the common law *D'Oench Duhme* doctrine, but its statutory counterpart as well. Further, the fact that the federal limitations rule arises purely by statute does not preclude courts from looking to federal common law in interpreting and applying that rule. Congress could have expressly made section 1821(d)(14) applicable to the FDIC's successors in interest, but one could just as easily argue that "Congress knew of the extensive body of case law extending the FDIC's benefits (like federal holder in due course, *D'Oench Duhme* and Section 1823(e)), and therefore thought it unnecessary to restate the federal common law." Woram, supra at 304. In *Bledsoe*, the court noted that

> [i]t is an axiomatic principle of statutory construction that in effectuating Congress' intent courts are to fill the inevitable statutory gaps by reference to the principles of common law.

989 F.2d at 810. Similarly, the Supreme Court has directed federal courts "to fill the interstices of federal legislation 'according to their own standards'" in areas affecting nationwide federal programs. *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 727 (1979) (quoting *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943)). Federal banking law undoubtedly constitutes such a program. *See* Woram, supra at 308.

B

Jackson and Weatherly also argue that statutes of limitations do not confer a "right" transferrable to assignees. In *City of Dallas v. Etheridge*, 253 S.W.2d 640, 643 (Tex. 1953), we stated that "statutes of limitations do not affect the substantive rights of parties; they merely bar the remedy by which one party seeks to enforce his substantive rights." In the present case, however, the FDIC's successors in interest are not asserting the FIRREA limitations provisions to *avoid* an obligation, but rather to *enforce* obligations that would otherwise be barred under state law. In this context, FIRREA does create a right transferable to subsequent purchasers. *See* Woram, supra at 306, Boteler, supra at 1178.

Alternatively, Jackson and Weatherly contend that the FIRREA limitations provision is a right "personal" to the FDIC, and thus non-transferable according to the general rule as stated in Corpus Juris Secundum:

> Unless a contrary intention is manifest or inferable, an assignment ordinarily carries with it all rights, remedies, and benefits which are incidental to the thing assigned, *except those which are personal to the assignor and for his benefit only*.

6A C.J.S. Assignments, § 76 (1975) (emphasis added). Jackson and Weatherly basically argue that the FIRREA limitations provision is personal to the FDIC simply because it is the only party expressly named in the statute. An examination of the cases cited in Corpus Juris Secundum in support of the quoted rule, however, reveals that rights "personal" to the assignor are those which, although relating to the property assigned, constitute

accrued causes of action that may be asserted independently of ownership of the property. *See Briedecker v. General Chem. Co.*, 47 F.2d 52 (7th Cir. 1931) (conveyance of land held not to constitute an assignment of the grantor's cause of action for damages previously sustained for trespass upon the land conveyed); *Huston v. Ohio & Colorado Smelting & Ref. Co.*, 165 P. 251 (Colo. 1917) (assignment of stock held not to transfer assignor's cause of action for fraud in connection with the stock's purchase). The extended limitations period afforded by FIRREA, which confers no benefit independent of the asset to which it relates, does not fall into this category.

For the foregoing reasons, we conclude that, pursuant to federal common law, the limitations provision of 12 U.S.C. § 1821(d)(14) applies to actions brought by purchasers of assets from the FDIC.

III

Jackson further argues that section 1821(d)(14) cannot apply retroactively to claims arising before FIRREA's enactment on August 9, 1989.

The statute contains no express provision dictating either prospective or retroactive application, and the legislative history on this issue is sparse and inconclusive.[15] The United States Supreme

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[15] Representative Solomon Ortiz commented as follows during floor debates:

> I seek to clarify the intent and effect of prospective application of the proposed bill. I understand this bill would redefine and augment the powers of the Federal Deposit Insurance Corporation when that Corporation serves as receiver for a failed financial institution. The powers set forth in this bill are, in many respects, new, and there is no intent that such powers be applied to receiverships that have

Court has provided conflicting guidance as to retroactive operation of a statute where the intent of Congress is not manifest. In *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988), the Court stated that "[C]ongressional enactments . . . will not be construed to have retroactive effect unless their language requires this result." Conversely, the Court stated in *Bradley v. School Bd. of Richmond*, 416 U.S. 696, 711 (1974), that

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been established prior to the enactment of this bill.

135 Cong. Rec. H5003 (daily ed. Aug 3, 1989). Henry B. Gonzalez, one of FIRREA's sponsors, stated that "as far as I know, there is no retroactive language in any part of the bill that would have any impact one way or the other on pending litigation." 135 Cong. Rec. H2748 (daily ed. June 15, 1989). Representative Ortiz, however, was not on a major committee overseeing FIRREA, and Representative Gonzalez's comment was in response to a specific question unrelated to limitations. *See* Jett Hanna, *Statute of Limitations Issues in FDIC and RTC Claims Against Attorneys Representing Failed Financial Institutions*, 12 Rev. Litig. 619, 640-41 (1993).

Senator Donald Riegle, referring specifically to the limitations provisions, commented that

> these limitations periods will significantly increase the amount of money that can be recovered by the Federal Government through litigation, and help ensure the accountability of the persons responsible for the massive losses the Government has suffered through the failures of insured institutions. The provisions should be construed to maximize potential recoveries by the Federal Government by preserving to the greatest extent permissible by law claims that would otherwise have been lost due to the expiration of hitherto applicable limitations periods.

135 Cong. Rec. S10,205 (daily ed. Aug. 4, 1989). This legislative history has been referred to as "fragmentary and contradictory." *Hanna*, supra at 640.

> a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary.

Despite this tension,[16] it has generally been held that procedural rules apply retroactively. *See United States v. Fernandez-Toledo*, 749 F.2d 703, 705 (11th Cir. 1985); *Fust v. Arnar-Stone Labs, Inc.*, 736 F.2d 1098, 1100 (5th Cir. 1984). In accordance with this principle, most courts have concluded that section 1821(d)(14) applies retroactively to causes of action in existence when the statute was passed in August 1989. *See FDIC v. Belli*, 981 F.2d 838, 842 (5th Cir. 1993); *FDIC v. New Hampshire Ins. Co.*, 953 F.2d 478, 487 (9th Cir. 1991); *RTC v. Foley*, 829 F.Supp. 352, 353 (D.N.M. 1993); *RTC v. Greenwood*, 798 F.Supp. 1391, 1397 (D. Minn. 1992); *FDIC v. Schoenberger*, 781 F.Supp. 1155, 1158 (E.D. La. 1992); *FDIC v. Bancinsure, Inc.*, 770 F.Supp. 496, 499 (D. Minn. 1991); *RTC v. Krantz*, 757 F.Supp. 915, 922 (N.D. Ill. 1991); *FDIC v. Howse*, 736 F.Supp. 1437, 1446 (S.D. Tex. 1990); *Central States Resources Corp. v. First Nat. Bank in Morrill*, 501 N.W.2d 271, 277 (Neb. 1993). *But see FDIC v. Cherry, Bekaert & Holland*, 742 F.Supp. 612, 616 (M.D. Fla. 1990).

Retroactive application of section 1821(d)(14) is especially appropriate since it does not create an entirely new limitations scheme, but rather merely clarifies and amends the existing law under 28 U.S.C. § 2415(a).[17] *See Howse*, 736 F.Supp. at 1446;

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[16] The Supreme Court noted the "apparent tension" between *Bradley* and *Bowen* in *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 837 (1990), but found it unnecessary to resolve the conflict in that case.

[17] As discussed at note 3, supra, section 1821(d)(14) expressly resolves the conflict under section 2415(a) concerning when the six year limitations period begins to run, and also grants the FDIC the benefit of the state statute of

Schoenberger, 781 F.Supp. at 1158. Retroactive application thus creates no manifest injustice. For these reasons, we agree with the majority of courts that have applied section 1821(d)(14) retroactively.

Jackson further argues that, even if section 1821(d)(14) is generally accorded retroactive application, its enactment cannot revive a claim already stale under state limitations. Jackson apparently contends as follows: the Texas four year statute of limitations commenced on May 3, 1984, when Jackson defaulted on his promissory note. Although this state limitations provision was superseded by 28 U.S.C. § 2415(a) while the note was held by the FDIC, it once again became applicable when Thweatt acquired the note on December 28, 1988. Recovery on the note was thus barred as soon as it was acquired by Thweatt, as this occurred more than four years after the original default. Because the claim was barred under state law when FIRREA was passed in 1989, it cannot be revived by that legislation, even assuming retroactive application.

Jackson correctly identifies the well-settled rule that a special federal limitations provision will not revive a claim already barred under state law. *See Belli*, 981 F.2d at 842; *FDIC v. Former Officers and Directors of Metropolitan Bank*, 884 F.2d 1304, 1309, n.4 (9th Cir. 1989); *Hinkson*, 848 F.2d at 434; *FDIC v. Consol. Mortgage and Fin. Corp.*, 805 F.2d 14, 17 n.4 (1st Cir. 1986). For example, if the FDIC is appointed receiver of a Texas bank five years after the default of an outstanding loan, suit is barred by the four-year Texas statute of limitations even though the federal limitations period is six years.

This rule does not apply here, however, as the claim against Jackson was not stale when the FDIC was appointed

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limitations if longer than six years.

receiver in 1985, less than a year after Jackson's default. The FDIC thus obtained the benefits of the six year limitation period under 28 U.S.C. § 2415(a), the forerunner of section 1821(d)(14). The claim in the hands of the FDIC was therefore *not* barred when FIRREA was passed in August 1989, as this was less than six years after the initial default. The FDIC thus would have obtained the retroactive benefits of FIRREA. Thweatt, as assignee, likewise succeeds to those rights.

To summarize, we hold that section 1821(d)(14) applies to actions brought by purchasers of assets from the FDIC to recover on those purchased assets, and that it applies retroactively to claims in existence on August 9, 1989. Section 1821(d)(14) thus governs the collection actions against Jackson and Weatherly. Because these actions were filed within six years after appointment of the FDIC as receiver, they were timely. The judgment of the court of appeals in *Jackson v. Thweatt*, is affirmed, and the judgment of the court of appeals in *Federal Debt Management, Inc. v. Weatherly*, is reversed. Both causes are remanded to the trial court for further proceedings.

/s/ Thomas R. Phillips
Thomas R. Phillips
Chief Justice

Opinion Delivered: March 9, 1994

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-91-01321-CV

FEDERAL DEBT MANAGEMENT, INC., Appellant

V.

LEE WEATHERLY, Appellee

On Appeal from County Court at Law No. 4
Dallas County, Texas
Trial Court Cause No. cc-91-3560-d

OPINION

Before Chief Justice Enoch and Justices Kaplan and Chadick[1]
Opinion By Justice Kaplan

This is a collection case. Federal Debt Management, Inc. (FDM) sued Lee Weatherly to collect all sums due and owing under three promissory notes. The trial court held that FDM's claims were barred by limitations. FDM appeals. We affirm.

[1] The Honorable T. C. Chadick, Justice, Supreme Court of Texas, Retired, sitting by assignment.

FACTS

Weatherly executed three promissory notes payable to Heritage National Bank. Note 1 was in the principal sum of $1,100 and matured on September 30, 1986. Note 2 was in the principal sum of $4,400 and matured on November 3, 1986. Note 3 was in the principal sum of $17,500 and matured on September 2, 1986. Weatherly defaulted in his obligation to make payments under the notes.

Heritage was declared insolent on September 25, 1986. The FDIC was appointed as receiver of the bank. The FDIC sold the promissory notes to FDM on October 27, 1989. FDM filed suit against Weatherly more than four years after the notes matured. Weatherly filed an answer and moved for summary judgment based on the four-year statute of limitations. The trial court entered summary judgment in favor of Weatherly. This appeal follows.

ISSUE ON APPEAL

The issue on appeal is whether FDM's claim is governed by the four-year statute of limitations under Texas law or the six-year statute of limitations applicable to the FDIC under federal law. FDM contends that assignees of the FDIC are entitled to the protections of the six-year statute under the Financial Institution's Reform, Recovery, and Enforcement Act of 1989 (FIRREA). 12 U.S.C. § 1821(d)(14) (1989). Weatherly argues that the benefits conferred by the federal statute do not extend to assignees of the FDIC and that the four-year limitations provision of the Texas Civil Practice and Remedies Code controls the disposition of this case. TEX. CIV. PRAC. & REM. CODE ANN. § 16.004(a)(3) (Vernon 1986).

STATUTES OF LIMITATIONS

1. Generally

Statutes of limitations do not confer any right of action, but are enacted to restrict the period within which a right might be asserted. *American Nat'l Ins. Co. v. Hicks*, 35 S.W.2d 128, 130 (Tex. Comm'n App. 1931, judgm't adopted); *accord Salvaggio v. Houston Indep. Sch. Dist.*, 752 S.W.2d 189, 191-92 (Tex. App.--Houston [14th Dist.] 1988, writ denied). Statutes of limitations are remedial in nature. They do not constitute substantive law or create a right of action belonging to a particular party. *See Hicks*, 35 S.W.2d at 130. Rather, these statutes limit substantive rights "to compel the assertion of a cause of action within a reasonable time so that the opposing party has a fair opportunity to defend while witnesses are available." *Matthew Constr. Co. v. Rosen*, 796 S.W.2d 692, 694 (Tex. 1990). A statute of limitations is a shield of defense, not a spear of attack.

2. Statutory Construction

Courts are responsible for truly and fairly interpreting written law. *Simmons v. Arnim*, 110 Tex. 309, 220 S.W. 66, 70 (1920). We begin any statutory analysis by reviewing the statute. *Cail v. Service Motors, Inc.*, 660 S.W.2d 814, 815 (Tex. 1983). If the statute is clear and unambiguous, extrinsic aids and rules of statutory construction are inappropriate. *Ex parte Roloff*, 510 S.W.2d 913, 915 (Tex. 1974). We seek the intent of the legislature as found in the plain and common meaning of the words and terms used. *Moreno v. Sterling Drug, Inc.*, 787 S.W.2d 348, 352 (Tex. 1990). We must follow the clear language of the statute. *RepublicBank Dallas, N.A. v. Interkal, Inc.*, 691 S.W.2d 605, 607 (Tex. 1985).

3. Federal Statute of Limitations

Section 1821(d)(14) of the United States Code creates a six-year statute of limitations for any action brought by the FDIC. The statute provides, in relevant part:

> (A) Notwithstanding any provision of any contract, the applicable statute of limitations with regard to any action *brought by the [FDIC]* as conservator or receiver shall be--
>
> (i) in the case of any contract claim, the longer of -
>
> (I) the 6-year period beginning on the date the claim accrues;
>
> (II) the period applicable under State law
>
> . . . .

12 U.S.C. § 1821(d)(14) (1989) (emphasis added).[2]

4. Texas Statute of Limitations

Section 16.004 of the Texas Civil Practice and Remedies Code creates a four-year statute of limitations for certain cases. The statute provides, in relevant part:

---

[2] We note that section 1821(d)(14) was not enacted until August 9, 1989, as part of FIRREA, Pub. L. No. 101-73, § 212(d)(14), 103 Stat. 183, 232-33 (1989). However, courts have given the provision retroactive effect. *See FDIC v. Howse*, 737 F.Supp. 1437, 1445-46 (S.D. Tex. 1990).

(a) A person must bring suit on the following actions not later than four years after the day the cause of action accrues:

. . .

(3) *debt.*

TEX. CIV. PRAC. & REM. CODE ANN. § 16.004(a)(3) (Vernon 1986) (emphasis added).

APPLICATION OF LAW TO THE FACTS

The language of section 1821(d)(14) is clear and unambiguous. The six-year statute of limitations applies only to actions "brought by *[the FDIC]* as conservator or receiver." 12 U.S.C. § 1821(d)(14) (emphasis added). Assignees of the FDIC are not covered by the express terms of the statute.

FDM contends that, notwithstanding the plain language of section 1821, actions brought by assignees of the FDIC should be governed by the six-year statute of limitations. FDM argues that: (1) federal common law supports the extension of the six-year statute of limitations to assignees of the FDIC; (2) the federal holder in due course doctrine and Texas UCC require the application of the six-year statute of limitations in this case; and (3) public policy dictates expanding the scope of the statute to include assignees of the FDIC. We reject these contentions.

1. Federal Common Law

FDM contends that the development of federal common law supports the extension of the six-year statute of limitations to assignees of the FDIC. FDM relies on cases that extend the

common law *D'Oench, Duhme*[3] doctrine. We agree that courts may expand common law principles to further sound public policy. However, the limitations provisions involved in this case are codified in a statute. We must interpret the statute as written and seek the intent of Congress as found in the plain and common meaning of the words and terms used. *Moreno*, 787 S.W.2d at 352; *Interkal*, 691 S.W.2d at 607.

Several federal district courts and the fifth circuit court of appeals have declined to expand the scope of FIRREA to cover entities other than those expressly named in the statute. *See Porras v. Petroplex Sav. Ass'n*, 903 F.2d 379, 381 (5th Cir. 1990); *see also Kilpatrick v. Riddle*, 907 F.2d 1523, 1528 (5th Cir.), *cert. denied*, 111 S. Ct. 954 (1990); *Adams v. Madison Realty & Dev. Inc.*, 746 F.Supp. 419, 431 (D.N.J.), *aff'd*, 937 F.2d 845 (3d Cir. 1990); *Morgan v. Heights Sav. Ass'n*, 741 F.Supp. 620, 622 (E.D. Tex. 1990); *but see B. L. Nelson & Assoc. v. Sunbelt Sav.*, 733 F.Supp. 1106, 1112 (N.D. Tex. 1990) (extending both statute and common law doctrine). Rather, these cases rely on the common law *D'Oench, Duhme* doctrine to protect the rights of assignees. Federal common law principles cannot be used to expand the protections afforded to the FDIC under section 1821(d)(14).

2. Federal Holder in Due Course and Texas UCC

FDM next contends that the federal holder in due course doctrine and Texas UCC support the extension of the six-year statute of limitations in this case.

a. Federal Holder in Due Course Doctrine

The federal holder in due course doctrine prevents the

---

[3] *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942).

maker of a promissory note from asserting personal claims as defenses or set-offs to the detriment of a bank's other creditors or depositors.[4] *Campbell Leasing, Inc. v. FDIC*, 901 F.2d 1244, 1249 (5th Cir. 1990). Under Texas law, however, a holder in due course is still subject to a valid limitations defense. *Cooper v. Hampton*, 123 S.W.2d 941, 942 (Tex. Civ. App.--Amarillo 1938, writ dism'd).[5] FDM has asserted a state, rather than a federal, cause of action against Weatherly. Since a statute of limitations is procedural in nature, Texas law applies unless expressly preempted. *See Morton v. Texas Welding & Mfg. Co.*, 408 F.Supp. 7, 9 (S.D. Tex. 1976). No such preemption exists under federal law for assignees of the FDIC.[6]

b. Texas UCC

Section 3.201(a) of the Texas Business and Commerce

---

[4] The federal holder in due course doctrine and the *D'Oench, Duhme* doctrine are closely related. *Porras*, 903 F.2d at 381. Although there are differences between the two concepts, both enhance the ability to protect assets of failed institutions. The reasoning used by the courts in discussing one of the doctrines generally applies to the other. *Id.* The federal *D'Oench, Duhme* type defenses allow regulators to rely on the face value of bank records in valuing assets. These common law defenses are unique to federal corporate entities such as the FDIC, which insure deposits in financial institutions. *See Larsen v. FDIC/Manager Fund*, 835 S.W.2d 66, 68 (Tex. 1992).

[5] We recognize that *Cooper* was decided before the Uniform Commercial Code was adopted in Texas. However, the parties to this appeal do not contend that a successor to the rights of a holder in due course is free from an otherwise valid limitations defense. The holding in *Cooper* thus remains unchanged by the Code.

[6] FDM's federal holder in due course argument begs the question. The issue remains whether the claim against Weatherly is governed by the four-year statute of limitations under Texas law or the six-year statute applicable to the FDIC under federal law.

Code provides, in pertinent part, that "transfer of an instrument vests in the transferee such *rights* as a transferor has therein." TEX. BUS. & COM. CODE ANN. § 3.201(a) (Vernon 1968) (emphasis added). FDM argues that, as an assignee, it stepped into the shoes of the FDIC and acquired its "rights" in the six-year statute of limitations.

The statute of limitations governing a particular cause of action is not a "right" inherited by an assignee. Rather, a statute of limitations is remedial in nature and limits substantive rights to compel the assertion of a cause of action within a specified period of time. *Rosen*, 769 S.W.2d at 694. FDM cannot step into the shoes of the FDIC for the purpose of asserting a procedural defense applicable only to the FDIC in its capacity as conservator or receiver.

3. Public Policy

FDM argues that the extension of the six-year statute of limitations to assignees of the FDIC plays a vital role in the scheme of resolving the affairs of insolvent financial institutions. This public policy argument is founded on the need to facilitate the private takeover of failed banks in order to lessen the burden on the FDIC insurance fund. We agree with FDM's interpretation of the legislative purpose of FIRREA. However, we cannot rewrite an otherwise clear and unambiguous statute under the guise of public policy. We must interpret the statute as written by Congress. *Interkal*, 691 S.W.2d at 607.

4. Other Cases

FDM relies on two Texas cases and one federal district court opinion that expand the limitations provisions of section 1821(d)(14) to include assignees of the FDIC. In *Thweatt v. Jackson*, No. 03-91-364-CV (Tex. App.--Austin August 26, 1992, n.w.h.) (op. on reh'g) (not yet reported), the Austin court of

appeals extended the six-year statute of limitations to the purchaser of a promissory note. The court justified extending the protections of section 1821 to the assignee under the holder in due course doctrine and for public policy reasons. *Thweatt*, slip op. at 5, *citing Porras*, 903 F.2d at 381.[7]

We reject the Austin court's interpretation of section 1821(d)(14) for the reasons previously set forth in our opinion. Instead, we reiterate the sound principles underlying the separation of powers doctrine expressed by Justice Powers in his dissenting opinion:

> Statutory language means something. If the statute is insufficient in terms of policy, it is the privilege of *Congress* to amend it. It is not a court's prerogative to add to an unambiguous statute a subject and class of persons not included therein, merely to effectuate the *court's* idea of what would be a wise and expedient addition. [Citation omitted.] A *court* may not assume Congress was ignorant of the relevant public policy when that body composed the statute in unambiguous terms to work in harmony with a general and complicated scheme intended to implement that very policy through the FDIC as receiver. A *court* may not assume it is wiser, better informed, or more able to formulate and implement the public policy in question. Congress having made *its* choices about implementing *its* decisions regarding the policy, it only remains for the court to enforce the will of Congress expressed in clear and unambiguous terms.

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[7] *Porras* does not support the court's extension of section 1821 to assignees of the FDIC. Rather, the *Porras* case involved the extension of the common law *D'Oench, Duhme* doctrine.

Thweatt, slip op. at 5 (Powers, J., dissenting) (emphasis in original).

In *Pineda v. PMI Mortgage Insurance Co.*, No. 13-91-239-CV (Tex. App.--Corpus Christi May 28, 1992, n.w.h.) (not yet reported), the court extended the six-year statute of limitations to assignees of federal agencies because the assignee acquired the "right" to use the limitations provision in the statute. *Pineda*, slip op. at 18. The court also held that the Texas four-year statute of limitations is tolled for all purposes when a federal agency acquires a note. *Pineda*, slip op. at 18, *citing United States v. Sellers*, 487 F.2d 1268 (5th Cir. 1973). We have rejected the argument that the statute of limitations confers a "right" that can be passed along to assignees. In addition, the holding in *Sellers* tolls the statute of limitations against the government at the time the government acquires a claim. *Sellers*, 487 F.2d at 1268. *Sellers* does not address claims asserted by assignees of governmental agencies or regulatory bodies. We reject the argument that the Texas four-year statute of limitations is somehow tolled and ceases to run against an assignee of the FDIC.

Finally, FDM cites *Mountain States Financial Resources Corp. v. Agrawal*, 777 F.Supp. 1550 (W.D. Okla. 1991), in support of its position. Like *Thweatt* and *Pineda*, the court in *Agrawal* extended the limitations provisions of section 1821(d)(14) based on the common law principle that "an assignee stands in the shoes of an assignor, and acquires all of the assignor's rights and liabilities in the assignment." *Agrawal*, 777 F.Supp. at 1552. We have held that the statute of limitations governing a particular cause of action is not a "right" inherited by an assignee. We do not find *Agrawal* persuasive.

CONCLUSION

We conclude that FDM's claims against Weatherly are controlled by the four-year statute of limitations set forth in section

16.004 of the Texas Civil Practice and Remedies Code. FDM is not entitled to the protections afforded to the FDIC under section 1821(d)(14). The record affirmatively shows that FDM did not file suit within four years after the cause of action accrued. FDM's claims are barred by limitations.

We overrule FDM's point of error. The judgment is affirmed.

/s/ Jeff Kaplan
JEFF KAPLAN
JUSTICE

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RE: Case No. D-3437

Style: FEDERAL DEBT MANAGEMENT, INC.
v. LEE WEATHERLY

Dear Counsel:

Today, the Supreme Court of Texas overruled the motion for rehearing in the above referenced cause.

Justice Enoch not sitting.

Sincerely,

John T. Adams, Clerk

by /s/ Blanca Morin
Blanca Morin, Deputy

Supreme Court, U.S.
FILED
AUG 17 1994
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(2)

No. 94-126

In The

Supreme Court of the United States

October Term, 1994

LEE WEATHERLY,

Petitioner,

v.

FEDERAL DEBT MANAGEMENT, INC.,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of The State Of Texas

BRIEF OF RESPONDENT FEDERAL DEBT MANAGEMENT, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Do assignees and transferees of failed bank assets purchased from the FDIC, receive in the assignment and transfer of the underlying substantive right, the right and benefit of the six-year statute of limitations enjoyed by FDIC pursuant to 12 U.S.C. § 1821(d)(14), as a matter of federal law.

II. Whether 12 U.S.C. § 1821(d)(14) is a right, interest, or benefit of the FDIC that runs with an assignment of the underlying substantive right to FDIC's assignees.

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No. 94-126

In The

Supreme Court of the United States

October Term, 1994

LEE WEATHERLY,

Petitioner,

v.

FEDERAL DEBT MANAGEMENT, INC.,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of The State Of Texas

BRIEF OF RESPONDENT FEDERAL DEBT MANAGEMENT, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE SUPREME COURT:

The Respondent, Federal Debt Management, Inc., respectfully requests that this Court deny Petition for Writ of Certiorari submitted by the Petitioner, Lee Weatherly.

JURISDICTION

Jurisdiction of this Court is sought to be invoked under 28 U.S.C. § 1257(a).

However, as noted below, there are no conflicts among the United States Court of Appeals on the issue involved here, nor has such a Court decided a federal question in a way that would conflict with a state court of last resort or so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Rule 10.1(a), Supreme Court Rules. Further, no state court of last resort has decided the federal issues involved in this suit in conflict with the decision of another state court of last resort. Rule 10.1(b), Supreme Court Rules.

The decisions of the United States Court of Appeals for the Fifth Circuit and the various state courts of last resort are in harmony with the decisions of this Court and each court has shown its ability to decide this important question of federal law without the necessity of the supervision of this Court. Rule 10.1(c), Supreme Court Rules.

STATUTE INVOLVED

12 U.S.C. §§ 1821(d)(14)(A), (B).

STATEMENT OF THE CASE

The question before the Court is a case of first impression involving the application of the right, interest and benefit of the federal six-year statute of limitations, 12 U.S.C. § 1821(d)(14), as added by the Financial Institutions Reform, Recovery and Enforcement Act of 1989,

Pub. L. 101-73, 103 Stat. 183 ("FIRREA"), Title XII, to assignees and transferees of assets purchased from the FDIC.

The issue presented is whether assignees and transferees of failed bank assets purchased from the Federal Deposit Insurance Corporation ("FDIC") receive as part of the assignment and transfer, as a matter of federal law, the right and benefit of the federal six-year statute of limitations enjoyed by FDIC pursuant to 12 U.S.C. § 1821(d)(14).

Respondent agrees with the statement of the case stated by Petitioner except in the following particulars.

From the commencement of this suit on April 15, 1991, Respondent, Federal Debt Management, Inc. (hereinafter "FDM" or "Respondent"), asserted that it was the assignee and transferee of the notes in question from the FDIC pursuant to those exhibits evidencing assignment and transfer attached to FDM's Original Petition ("Petition"). FDM argued in response to Petitioner's Motion For Summary Judgment that the Texas four-year statute of limitations did not apply, but that the federal six-year statute of limitations cited above applied to the time limits available to FDM's right to recover in this case.

At the time that the FDIC acquired the notes in question, there is no question that the respective causes of actions on all three notes were still alive. In fact, the cause of action on one of the notes involved did not even accrue until after FDIC acquired the notes on September 25, 1986. Further, there is no question that had the FDIC held on to the notes in question it would have had until

at least September 2, 1992 through November 3, 1992 to file suit on the respective notes.

On August 9, 1989, FIRREA was enacted creating 12 U.S.C. § 1821(d)(14). All causes of action on the notes were still alive and were still owned by the FDIC as receiver for Heritage National Bank ("FDIC Receiver"). The exhibits attached to FDM's Petition show that the FDIC-Receiver sold, transferred, and assigned the notes to FDM on November 7, 1989[1], nearly three months after the enactment of FIRREA. Thus, this case does not necessarily require the retroactive application of FIRREA to claims in existence on August 9, 1989.

REASONS FOR NOT GRANTING THE WRIT

I. The Passing of the Federal Six-Year Statute of Limitations to Assignees With the Assignment of Underlying Substantive Rights Enhances FDIC's Ability to Efficiently Liquidate Assets of Failed Institutions.

The FDIC was established under authority of Section 8 of the Banking Act of 1933, and Section 101 of the Banking Act of 1935, which became effective August 23, 1935, and which provided the permanent plan of deposit insurance contained in existing law. H. R. Rep. No. 2564, 81st Cong., 2d Sess. (1950), *reprinted in* 1950 U.S.C.C.A.N.

[1] The Briefs of the parties below, including FDM, and the opinions below state that the notes were assigned on October 27, 1989. Further review of the respective Bills of Sale attached to FDM's Petition reveal that they were executed November 7, 1989. The difference is not material to the issues in the case but is only cited for clarity.

3765. The Federal Deposit Insurance Act ("FDIA"), 12 U.S.C. § 1811, *et seq.*, which established and created the FDIC, was originally enacted as Section 12B of the Federal Reserve Act, 12 U.S.C. § 264 (1933).

The purpose of the FDIC, as articulated in the FDIA, is to bring to depositors sound, effective, and uninterrupted operation of the banking system with resulting safety and equity of bank deposits. H. R. Rep. No. 2564, 1950 U.S.C.C.A.N. at 3765-66.

The FDIC traditionally had two choices in the disposition of failed bank assets: straight liquidation and distribution to depositors and creditors or transferring such assets to an assuming bank thereby lessening the potential negative impact on the insurance fund. *Gunter v. Hutcheson*, 674 F.2d 862, 865 (11th Cir.), *cert. denied*, 459 U.S. 1059 (1982).

Over time, the FDIA has been amended to provide the FDIC with greater authority and power. Initial amending legislation gave the FDIC added authority to make loans, purchase its assets, or make deposits in order to prevent the closing of an insured bank.[2]

The increased number of bank failures in the mid-1980s together with geographic concentration of banking problems and the large size of some troubled banks made it increasingly difficult for the FDIC to efficiently liquidate the assets of failed banks. S. Rep. 19, 100th Cong. 1st Sess. (1987), *reprinted in* 1987

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[2] H. R. Rep. No. 2564, 1950 U.S.C.C.A.N. at 3773-74, 3777-78.

U.S.C.C.A.N. 491, 511-12. In an effort to deal with growing problems among financial institutions, the FDIC sought legislation to enhance its ability to handle failed and failing banks with minimum disruption to local economies and minimum costs to the insurance fund.

As a result, Congress initially enacted the Competitive Equality Banking Act of 1987, Pub. L. No. 100-86, 101 Stat. 552 (1987) (the "Bridge Bank Statute"). Two years later, Congress enacted FIRREA. One of the main goals of both pieces of legislation was to enhance FDIC's ability to find purchasers of failed bank assets and obtain the best possible price for such banking business, thus lessening the potential negative impact on the FDIC insurance fund. S. Rep. 19, 1987 U.S.C.C.A.N. at 512; FIRREA, Section 101(8).

Congress authorized suits by FDIC in its corporate capacity ("FDIC-Corporate"), in assets acquired from FDIC as receiver that are not transferred to an assuming bank, in order that FDIC might recoup, or at least mitigate, the losses to the insurance fund (and, in large measure, ultimately to the taxpayers) that result from bank failure. *FDIC v. Bank of Boulder*, 911 F.2d 1466, 1470 (10th Cir. 1990), *cert. denied*, 499 U.S. 904 (1991).

Until recently, the FDIC almost always sought to recover such losses by bringing suit in its own name, as evidenced by the hundreds of reported decisions involving FDIC suits on notes, guarantees and other instruments or assets acquired by purchase and assignment from FDIC as receiver.

In recent years, however, the sheer volume of assets coming into the hands of the FDIC has forced the FDIC to

attempt to realize value for some of such assets in ways other than bringing suit in its own name. One of the alternative methods by which the FDIC does so is by selling such assets to third parties at their market value. Jeffrey M. Sharp, *Extending the FDIC's "Super Powers" to its Transferrees: A Vehicle for Privatizing Loss Recovery*, 97 Com. L.J. 49, 59, 66 (1992) [hereinafter "Sharp"].

Contrary to Petitioner's unsupported statement that these investors hope "to gain a windfall at the expense of the FDIC and . . . the taxpayers" the application of the six-year statute of limitations benefits both. *Id.*; James J. Boteler, Comment, *Protecting the American Taxpayers: Assigning the FDIC's Six-Year Statute of Limitations to Third Party Purchasers*, 24 Tex. Tech. L. Rev. 1169, 1200 (1993) [hereinafter "Boteler"]; *cf.*, Petition for Writ of Certiorari ("Petition for Cert.") at 4.

For approximately the last fourteen years, the lower federal and state courts have been very busy addressing issues relating to the rights of purchasers of assets of failed institutions from the FDIC. This is so despite the fact that the fall-out of major banking institutions has had an impact on customers, depositors, and creditors nationwide.

A. This Court Has Only Intervened Twice in Cases of This Type.

For the last fifty-two years, this Court has only found it necessary to intervene in cases involving the rights and obligations of the FDIC or its assignees of this type in two

instances.[3] There are many instances where this Court has not found it necessary to decide cases involving the rights and obligations of assignees (purchasers) of the various federal banking regulators. *See e.g. Bell & Murphy & Assoc. v. InterFirst Bank Gateway*, 894 F.2d 750 (5th Cir.), *cert. denied*, 498 U.S. 895 (1990).

This Court has already denied certiorari to hear a case squarely on point with the present case. *Cadle Co. II, Inc. v. Lewis*, 864 P.2d 718 (Kan. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1613 (1994).

B. The Lower Federal and State Courts Decisions Are Uniform, Thus Demonstrating This Court's Supervision Is Not Necessary.

As noted by the Petition for Cert., over the past several years, numerous courts have considered and decided the issue of whether an assignee of the FDIC is entitled to the benefits of the federal six-year statute of limitations under 12 U.S.C. § 1821(d)(14). One court has noted that there is at least twenty opinions to date, published and unpublished, that discuss this issue.[4] All federal and state courts have held that

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[3] The first instance was in this Court's seminal case of *D'Oench, Duhme & Co., v. FDIC*, 315 U.S. 447 (1942) (No Federal Statute defined the rights of the corporation as holder of the note it acquired). The second instance, some forty-five (45) years later was another leading case, *Langley v. FDIC*, 484 U.S. 86 (1987) (rights of FDIC in its corporate capacity as assignee of FDIC as receiver in note not transferred to an assuming bank under a purchase and assumption transaction).

[4] *Investment Co. of the Southwest v. Reese*, 875 P.2d 1086 (N.M. 1994).

a successor in interest to the FDIC enjoys the benefits of the six-year statute of limitations. Three federal district courts have confronted this issue.[5] One Circuit Court of Appeals has recently addressed this question.[6] Four prior lower state court decisions that held that the federal limitations period could not be transferred, all have been reversed.[7]

Nine opinions from various state courts follow the unanimous federal court opinions. Of these nine state court cases, five (5) have been decided by the highest court of the state[8] and the highest court of the State of

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[5] *Mountain States Financial Resources Corp. v. Agrawal*, 777 F. Supp. 1550 (W.D. Okla. 1991); *North Amer. Credit Consultants v. Garlic Sales and Serv. Co.*, No. 91-1066-C, 1992 WL 477016 (W.D. Okla., Oct. 20, 1992); *Fall v. Keasler*, No. C-90-20643, 1991 WL 340182 (N.D. Cal., Dec. 18, 1991).

[6] *FDIC v. Bledsoe*, 989 F.2d 805 (5th Cir. 1993) (holding that assignees of both FDIC and FSLIC are entitled to the six-year statute of limitations).

[7] Three of these come from Texas: *Federal Debt Management v. Weatherly*, 842 S.W.2d 774 (Tex. App. – Dallas 1992), *rev'd*, 37 Tex. Sup. Ct. J. 555 (March 9, 1994); *EKA Liquidators v. Phillips*, No. 4157, 1994 WL 70402 (Tex. March 9, 1994); *Cadle Co. v. Estate of Weaver*, No. D-3866 1994 WL 70403 (Tex. March 9, 1994). The fourth case concerns 28 U.S.C. § 2415(a), *Tivoli Ventures, Inc. v. Tallman*, 852 P.2d 1310 (Colo. App. 1992), *rev'd*, 870 P.2d 1244 (Colo. 1994).

[8] *Federal Debt Management, Inc. v. Weatherly*, 37 Tex. S.Ct. J. 555 (Tex. March 9, 1994); *Tivoli Ventures, Inc. v. Tallman*, 870 P.2d 1244 (Colo. 1994); *Investment Co. of the Southwest v. Reese*, 875 P.2d 1086 (N.M. 1994); *Cadle Co. II Inc. v. Lewis*, 864 P.2d 718 (Kan. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1613 (1994); and *Central States Resources Corp. v. First National Bank in Morrill*, 501 N.W.2d 271 (Neb. 1993).

California has refused to review the reported lower court opinions on this issue.[9]

There are thus no effective federal or state court decisions holding that the benefit of the federal limitations period cannot be assigned to a private party by the FDIC.

Thus, despite the alleged "proliferation of suits by the third party purchasers" characterized by Petitioner herein, this uniformity of decisions among at least nine (9) separate jurisdictions demonstrates that the lower federal and state courts are fully capable of deciding this issue of federal law and that the question presented is not one that should be answered by this court.

C. The Texas Supreme Court Correctly Concluded That § 1821(d)(14) Creates a "Right" Transferrable to Subsequent Purchasers.

Both federal common and statutory law recognize that 12 U.S.C. § 1821(d)(14) is not only a "right" but is also a right which is transferrable to subsequent purchasers of assets from FDIC as Receiver who are not expressly named in the statute. Boteler, *supra*, at 1177; *see also* Brian J. Woram, *FIRREA'S Statutes Of Limitations: Their Availability To Purchasers From The FDIC*, 110 Banking L.J. 292 (1993) [hereinafter "Woram"].

In *FDIC v. Howse*, 736 F. Supp. 1437 (S.D. Tex. 1990), the Defendants argued that since FDIC was acting in its

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[9] *White v. Moriarty*, 19 Cal. Rptr. 2d 200 (Cal. C. App.), *review denied*, (August 12, 1993).

corporate capacity in that action § 1821(d)(14) did not apply because that section purportedly "applies only to actions brought by FDIC as conservator or receiver." *Id.* at 1444-45. In that case, FDIC-Corporate was the assignee of FDIC in its capacity as receiver of certain of the failed institution's causes of action. *Id.* at 1445.

While the literal language of § 1821(d)(14) did not apply directly to FDIC-Corporate, the court in *Howse*, relied upon another provision of the same statute holding that FDIC-Corporate was entitled to "*the same rights and powers as FDIC-R under § 1821.*" *Howse*, 736 F. Supp. at 1445 (emphasis added). The court recognized that pursuant to the language of 12 U.S.C. § 1823(d)(3)(A), FDIC-Corporate was entitled to "all of the *rights*, powers, privileges and authorities of the corporation as receiver under § 1821" with respect to any asset acquired by the corporation. *Id.* at 1445 (emphasis added). "Since one of those *rights* is § 1821(d)(14)'s new limitations periods . . . it follows that § 1821(d)(14) applies equally to FDIC-Corporate." *Id.* (emphasis added)

Similarly, at least one court has held that § 1821(d)(14) applies to the Resolution Trust Corporation ("RTC"), even though RTC is not expressly named in the statute. *RTC v. Krantz*, 757 F. Supp. 915, 922 (N.D. Ill. 1991).[10]

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[10] Pursuant to 12 U.S.C. § 1441A(b)(4), as added by FIRREA, § 501(b)(4), the RTC shall have the same powers and *rights* to carry out its duties . . . as the [FDIC] has under sections 11, 12 and 13 of the Federal Deposit Insurance Act. Section 1821(d)(14) is part of section 11 of the FDIA.

Thus, this "right" is not "manufactured out of thin air by the Texas Supreme Court" as suggested by Petitioner but is created by § 1821(d)(14) itself, and recognized elsewhere in the text of FIRREA and by the courts.

D. Resort To Common Law Is Necessary To Fill Inevitable Statutory Gaps.

Precisely because the statute is silent as to the rights of any other party other than FDIC, the principles of the common law are to be utilized by the courts to fill this statutory gap. *D'Oench, Duhme & Company v. FDIC*, 315 U.S. 447, 469-72 (1942) (Jackson, J., concurring).

The common law of assignments not only supports, but also establishes the assignment of the right, benefit and remedy of the FIRREA statute of limitations provision to purchasers of the FDIC. *FDIC v. Bledsoe*, 989 F.2d 805, 810 (5th Cir. 1993) (and authorities cited therein).

While an assignment would not carry with it all rights, remedies and benefits incidental to the thing assigned *when* a contrary intent appears in the assignment *or when* the right, remedy *or* benefit is personal to the assignor and for his benefit alone, neither of these exceptions are applicable here. Further, the operation of the common law of assignments has absolutely nothing to do with whether or not a party purchasing an asset is doing so for its own benefit.

Not one single case or secondary source which has stated that rights, remedies or benefits personal to assignors and for their benefit alone are not assignable has involved a statute of limitations provision.[11]

II. The Extension of the Benefit of the Six-Year Statute of Limitations to Assignees Does Not Conflict With the Purposes of Statutes of Limitation.

FDM instituted this suit consistent with the purpose of statutes of limitations articulated in the authorities cited by Petitioner. *See* Petition For Cert. at 9-10.

While the primary purpose of statutes of limitation is to compel the exercise of a right of action within a reasonable time so that the opposing party has a fair opportunity to defend, that "reasonable time" became six years once the FDIC took over the notes in question from Heritage National Bank.

At that time, by operation of law, Petitioner was on notice that the FDIC could have waited six years to bring an action against Weatherly to enforce it. *FDIC v. Hinkson*, 848 F.2d 432, 435 (3rd Cir. 1988) (the 6-year limitation provision, 28 U.S.C. § 2415(a) "does not mandate a federal agency be precluded from suing in less than 6 years on an assigned claim."). Instead, the FDIC chose to sell and assign the Note to FDM. Weatherly did not win the

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[11] See Texas Supreme Court Opinion below. Petitioner is less than candid with this Court when he states that "statutes of limitation have never been treated as rights of plaintiffs – instead courts have uniformly held that statutes of limitation are personal to defendants." Petition For Cert. at 11.

right to repose under a shorter limitations period when the FDIC elected to sell the Note and assign it to FDM. *Fall v. Keasler*, No. C-90-20643, 1991 WL 340182 (N.D. Cal., Dec. 18, 1991).

FDM asserted its cause of action within the reasonable time articulated by the six-year statute of limitations. There is no concern in this case with stale facts, lost evidence or other difficulty in proof, defective memory, death or other unavailability of witnesses.

Nor can it be argued in the context of the extraordinary circumstances of bank failure that allowing "private third parties to assert a state law claim founded on contract beyond the time allowed by a state statute of limitations only frustrates the reasonable commercial expectations of the parties involved." Petition For Cert. at 9.

Clearly, the legitimate expectations of a maker of a note do not include the windfall of escaping liability because of the transfer of the note. Applying a uniform federal statute of limitations would result only in a maker being required to defend suit brought by a transferee during the same period when it could have been brought by the FDIC. As the Tenth Circuit Court of Appeals noted in *Bank of Boulder*, in the context of a federal rule permitting FDIC-Corporate to acquire non-transferrable letters of credit contrary to state law:

> the rule would come into effect only after an insured bank has failed. Parties cannot reasonably expect to carry on normal relationships at that point.

* * *

> [W]e note that if Colorado's transfer restrictions were enforced against FDIC/Corporation in this case, Bank of Boulder would likely receive an unexpected benefit. . . . If FDIC/Corporation is not allowed to enforce the letter of credit . . . then Bank of Boulder will be freed of its obligation to honor drafts of the Receiver of Dominion Bank. Clearly, Bank of Boulder could not have had a reasonable commercial expectation based on state law that if Dominion Bank went bankrupt, Bank of Boulder would be relieved of all liability under the letter of credit.

Bank of Boulder, 911 F.2d at 1147.

In the instant case, Petitioner Weatherly's expectations at the time he borrowed money from Heritage National Bank presumably included the ultimate repayment of his notes; he should not be given the windfall of forgiveness of his notes because of the vehicle by which FDIC sought to realize upon them.

III. The Decision of the Texas Supreme Court is in Accord With the Decision in Hinkson and the Decisions of This Court.

Even assuming the decision in *FDIC v. Hinkson*, 848 F.2d 432 (3rd Cir. 1988), were decided the same way under 12 U.S.C. § 1821(d)(14), which would not be the case, it would still not conflict with the Texas Supreme Court decision. *Hinkson*, contrary to Petitioner's argument, does not stand for the proposition that an assignee *of failed bank assets* from the FDIC is not governed by the same statute of limitations that apply to its assignor. Petition For Cert. at 11.

In *Hinkson*, the FDIC received an assignment of the note upon which it brought suit *as a result of an open bank assistance transaction* not by operation of law as a result of bank failure. Section 1821(d)(14) only applies to assets acquired by operation of law[12] initially by a conservator or receiver of an insured depository institution or subsequently acquired by FDIC or RTC in their corporate capacities and private parties (whether banks, individuals or other organizations) by transfer and assignment.

Further, even assuming the result in *Hinkson* was not changed by the current state of the law, which it would be, *Hinkson* merely stands for the proposition that there would be a uniform statute of limitations rule for FDIC and its subsequent assignees – the federal limitations period would govern an action by either FDIC or its assignees. As stated by the court in *Hinkson*:

> The federal limitations period will therefore govern in both instances – whether the state statute provides for a longer or shorter time than section 2415.

Hinkson, 848 F.2d at 434.

Significantly, however, if *Hinkson* were decided today, the FDIC would have been entitled to the longer period under state law. Section 1821(d)(14)(A) overrules *Hinkson* to the extent argued by Petitioner here as follows:

---

[12] Pursuant to 12 U.S.C. § 1821(d)(2)(A)(i)&(ii) "The Corporation shall, as conservator receiver, *and by operation of law*, succeed to – (i) all rights, titles, powers, and privileges of the insured depository institution . . . and (ii) title to the books, records, and assets" of the institution.

> (A) IN GENERAL – Notwithstanding any provision of any contract, the applicable statute of limitations with regard to any action brought by the corporation as conservator or receiver shall be –
>
> (i) in the case of any contract claim, *the longer of* –
>
> (I) The 6-year period beginning on the date the claim accrues; or
>
> (II) *The period applicable under state law.*

12 U.S.C. § 1821(d)(14)(A)(i)(I)&(II) (emphasis added).

Thus, since the State of Delaware has a twenty-year statute of limitations, the FDIC acquiring an asset in Delaware as conservator or receiver, would be entitled to a twenty-year statute of limitations period. In turn, an assignee of FDIC as conservator or receiver would likewise be entitled to the twenty-year statute of limitations period. Thus, the decision in *Hinkson* does not conflict with the decision of the Texas Supreme Court.

Nor does the Texas Supreme Court decision conflict with this Court's decision in *Cressey v. Meyer*, 138 U.S. 525 (1891) or any other decision of this Court.

First, Petitioner's reliance upon *Cressey*, like Petitioner's reliance upon *United States v. Summerlin*, 310 U.S. 414 (1940), is misplaced. There is no point to be made that the United States and its agencies at one time were not subject to state or federal limitations periods.

More importantly, neither *Summerlin* nor *Cressey* involve in any way rights of an assignee or transferee of

the government or its agencies. Thus, neither case can or does stand for the proposition that when the United States was immune from statutes of limitation, such immunity did not pass to its assignees or transferees.

In *Summerlin*, the United States itself was the party which brought suit. As noted by this Court in *Summerlin*:

> By a series of transactions . . . the Federal Housing Administrator, acting on behalf of the United States, became the assignee of a claim against the estate of one J. F. Andrew, deceased.
>
> * * *
>
> The claim assigned to the Federal Housing Administrator acting on behalf of the United States became the claim of the United States, and the United States thereupon became entitled to enforce it.

United States v. Summerlin, 310 U.S. at 414, 416.

In *Cressey*, suit was brought by a creditor of the "sovereign", *not an assignee or transferee*, there is a difference.

Nothing in *Cressey* or *Summerlin* addresses the rights, interests or remedies of the "sovereign" that pass to an assignee or transferee with the assignment of substantive rights. Neither of these cases anywhere expressly states that immunity from the application of statutes of limitations or the doctrine of laches is a personal right of the sovereign. Nor can *Cressey* be so construed vis-a-vis the government and its assignees from the fact that the government "*does not give to [its] creditor* its sovereign exemption from liability to the statute of limitation and the

defense of laches." *Cressey*, 138 U.S. at 528 (emphasis added).

A. The Texas Supreme Court Followed Well-Settled Rules of Statutory Construction.

Respondent agrees that the starting point in any case of statutory construction is the statute itself. *Demarest v. Manspeaker*, 498 U.S. 184 (1991). If the statute's language is plain as to the rights of the parties concerned, "the sole function of the court is to enforce it according to its terms." *Caminetti v. United States* 242 U.S. 470, 485 (1917).

If, on the other hand, the meaning of the statute is doubtful or ambiguous as the rights of the parties involved, the court "construes it to contain that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law." *West Virginia University Hospitals, Inc. v. Cassey*, ___ U.S. ___, 111 S.Ct. 1138, 1148 (1991).

In the present case, the statute in question, 12 U.S.C. § 1821(d)(14), is neither ambiguous nor unambiguous as to the rights of the parties concerned, i.e., assignees and transferees of assets from the FDIC. *FDIC v. Bledsoe*, 989 F.2d at 809-810. In other words, the clear and unambiguous language of the text itself says nothing about when assignees of the FDIC must bring substantive claims assigned.

Thus, as noted by the Fifth Circuit in *Bledsoe*, "the statutes are absolutely silent" as to the rights of the parties concerned. *Bledsoe*, 989 F.2d at 810. In such an

instance, another axiomatic principle of statutory construction is triggered. "In effectuating Congress' intent, courts are to fill the inevitable statutory gaps by reference to the principles of common law." *Bledsoe*, 989 F.2d at 810.

This court has recognized the principle that source materials of the common law may be used to answer a question presented to the court where reference to the text of the statute alone does not answer the question with regard to the parties concerned. *D'Oench Duhme*, 315 U.S. at 469-72 (Jackson, J., concurring).

This court has also directed the federal courts "to fill the interstices of federal legislation 'according to their own standards' " in areas affecting nationwide federal programs. *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 727 (1979) (*quoting Clearfield Trust Co. v. United States*, 315 U.S. 363, 367 (1943)).

The authorities cited by Petitioner are clearly distinguishable. The statutes being construed in those cases either: (1) expressly mentioned the parties affected by the statute or the specific rights of the specific parties affected; or (2) undertook to deal with rights related to the right in question, in various ways.

The question presented in *Demarest* was whether 28 U.S.C. § 1821 required payment of witness fees to a convicted state prisoner who was brought to testify at a federal trial pursuant to a writ of habeas corpus *ad testificandum*. *Demarest*, 111 S.Ct. at 601. The text of 28 U.S.C. § 1821 provided that "a witness in attendance at any court of the United States . . . shall be paid the fees and allowances provided by the section." *Demarest*, 111 S.Ct. at 602. The statute further provided that a "subsistence

allowance shall be paid to a witness (other than a witness who is incarcerated) when an overnight stay is required." *Id.*

Thus, the statute in *Demarest* is far different from the statute in the present case. The category of persons whose rights were being adjudicated were expressly mentioned in the statute.

Similarly, the issue in *West Virginia v. Cassey* was whether the term "witness fees" in a statute designed to shift court costs to losing parties also included "expert fees." *West Virginia,* 111 S.Ct. at 1140-1141. In that case, both the common law and the record of statutory usage of the term "witness fees" clearly evidenced that expert fees were separate from witness fees. *West Virginia,* 111 S.Ct. at 1141-1146. In the present case, both the common law and the application of statutory rights to assignees would require a different result.

Likewise, the statute in question in *In re Shearer,* 139 F. Supp. 217 (N.D. Cal. 1956) provided that "any natural person except a wage earner . . . may be adjudged an involuntary bankrupt." *In re Shearer,* 139 F. Supp. at 218. The petitioner in that case sought review of an order of a Referee adjudicating him an involuntary bankrupt after finding that he was not a "wage earner" within the meaning of the Bankruptcy Act. *Id.* The Bankruptcy Act in that case defined the term "wage earner." *In re Shearer,* 139 F. Supp. at 219. Thus, the category of persons affected was expressly defined in the statute.

Finally, unlike the present case, in *Iselin v. United States,* 270 U.S. 245 (1926), the legislature had exhaustively undertaken to deal with rights related to the

right in question in that case in various ways but omitted any reference to the particular right involved. The question in *Iselin* was whether the sale of a stockholder's opera box tickets which were not sold at ticket offices could be taxed under a statutory provision taxing the sale of tickets at ticket offices. The statute relied upon by the government to impose a tax was not applicable because it only applied to tickets which were regularly sold at ticket offices or other similar places. *Iselin*, 270 U.S. at 247. The tickets sold by the stockholder in question were free tickets which were reserved by the lessor of the opera house for all performances. Thus, the tickets were not regularly sold.

IV. The Extension of Federal Statutory Rights to Assignees, as Well as Congressional Intent Support the Decision of the Texas Supreme Court.

A. Federal and State Courts have extended the statutory provisions of 12 U.S.C. § 1823(e) to entities other than the FDIC.

While the literal language of § 1821(d)(14) speaks directly to the FDIC and not assignees, federal and state courts have not hesitated to extend the protections of 12 U.S.C. § 1823(e) to assignees of FDIC, and other federal banking regulators. Section 1823(e) contains language similar to § 1821(d)(14), speaking only to the FDIC.

A careful read of such cases demonstrates not only that the courts understand the distinction between statutory and common law rights, but also, that they care about the outcome under either scheme. This is evidenced by the fact that the rationale articulated for such

extension is twofold: (1) if a note is enforceable in the hands of the FDIC, it is equally enforceable in the hands of an assignee; and (2) the extension of such rights facilitates Congress' policy of protecting failed institutions' assets and the insurance fund.

In *FDIC v. Newhart*, 892 F.2d 47 (8th Cir. 1989), the Eighth Circuit embraced the extension of § 1823(e) to assignees of the FDIC when it held, in the context of a discussion of that defense, that "the FDIC transfers its protected status to subsequent purchasers of notes it holds." *Newhart*, 892 F.2d at 50.

The district court in *Newhart* found that the terms of § 1823(e) preempted the technical requirements of Missouri holder-in-due-course law once FDIC acquired an asset. *FDIC v. Newhart*, 713 F. Supp. 320, 324 (W.D. Miss.), *aff'd*, 892 F.2d 47 (8th Cir. 1989). The defendant argued that while his defenses were cut off as to FDIC, FDIC's assignee could not assert FDIC's holder-in-due-course status. *Id.* The court disagreed, holding in reliance upon two of its unpublished opinions that:

> [Defendant's] defenses could not be revived simply because the FDIC transferred the note to a third party.

Id.

The district court found the reasoning of the unpublished cases compelling "especially since a contrary result would emasculate the policy behind § 1823(e) of encouraging the FDIC to participate in transfer agreements." *Id.*

The Eighth Circuit affirmed, based on the dual propositions of law, that (1) an assignee stands in the shoes of the assignor, and (2) under Section 3.201(1) of the U.C.C., transfer of an instrument vests in the transferee such rights as the transferor had therein. *Newhart*, 892 F.2d at 50.

Discussing the policy behind § 1823(e), the Eighth Circuit stated as follows:

> In certain cases, such as the instant one, the FDIC may decide to sell returned assets after bringing suit for collection. Because these assets are usually non-performing loans, there would be little or no incentive for prospective purchasers to acquire them if they were subject to the personal defenses of the obligors based on undisclosed agreements. If this avenue of cutting losses became unavailable to the FDIC, purchase and assumption transactions would become more expensive and thus, less likely to occur.

Newhart, 892 F.2d at 50.

Concluding that this policy behind § 1823(e) supported the extension of federal holder-in-due-course status to an assignee bank, the Eighth Circuit stated:

> If holder-in-due-course status did not run with the notes acquired by the FDIC in purchase and assumption transactions, the market for such notes would be smaller, which would have a deleterious effect on the FDIC's ability to protect the assets of failed banks.

Id.

Similarly, in reliance upon the Eighth Circuit in *Newhart*, as well as *Deposit Guaranty Bank v. Hall*, 741 F. Supp. 1287 (S.D.Tex. 1990) and *Kilpatrick v. Riddle*, 907 F.2d 1523 (5th Cir.), *cert. denied*, 498 U.S. 1083 (1991), the court in *Alarcon v. FDIC*, 772 F. Supp. 334 (E.D.Mich. 1991) expressly held that § 1823(e) extends to assignees of the FDIC stating:

> [T]he court fully concurs [with] the proposition that when the FDIC has obtained a note previously held by a bank which has gone into receivership, and assigns the note to another bank, the assignee bank is entitled to the same protection under *D'Oench, Duhme*, and § 1823(e) as the FDIC itself. *In other words, if the note is enforceable in the hands of the FDIC, it is equally enforceable in the hands of the assignee bank.*

Alarcon, 772 F. Supp. at 342 (emphasis added); *see also, Hall*, 741 F. Supp. at 1290 (holding under § 1823(e) defendant was estopped from asserting affirmative defenses against an assignee of the FDIC); *RSR Properties, Inc. v. FDIC*, 706 F. Supp 524, 532 (W.D.Tex. 1989) (applying § 1823(e) to deficiency suit brought by an assignee of the FDIC).

In *Willow Tree Inv., Inc. v. Wagner*, 453 N.W.2d 641, 643 (Iowa 1990), the Iowa Supreme Court in extending § 1823(e)'s protections to assignees noted and rejected an argument identical to that raised by Petitioner here:

> Defendants claim that while the FDIC is granted special protection under § 1823(e), plaintiff, as purchaser, is not similarly insulated from the defenses that defendants could raise against the insolvent bank. *They note that the statute refers only to the "corporation" and makes no mention of*

> *extending its provisions to assignees or purchasers.* We believe that the purpose of § 1823(e) would not be furthered by limiting the application of its provisions to the FDIC.

Willow Tree Inv., 453 N.W.2d at 643 (emphasis added). The same analysis applies with equal force in the present case.

B. Congressional Intent Underlying Section 1821(d)(14) as Well as the Entire Comprehensive Scheme of Facilitating Resolution of Insolvent Institutions and Minimizing the Cost to the Insurance Fund Support the Decision of the Texas Supreme Court.

As noted above, when Congress passed FIRREA, it was not legislating on a clean slate. H.R. Rep. No. 54(I), 101st Cong., 1st Sess. 6 (1989), *reprinted in* 1989 U.S.C.C.A.N. at 87-93, 108. FIRREA "grew out of the acute and massive financial crisis of the thrift industry and the [FSLIC] a situation caused by a number of factors that included a regional economic collapse and fraud and insider abuse." *See*, Explanations to FIRREA, Title I, *Purposes of the Act*, para. 101; FIRREA, Section 101 at para. 2101. In this way, FIRREA builds upon the purposes and intent of the FDIA and the Bridge Bank Statute.

As noted by this court, "the words of a statute, particularly one with a remedial object, have a meaning imparted to them by 'the mischief to be remedied.' " *Aaron v. Securities & Exch. Comm'n*, 446 U.S. 680, 705 (1980) (Blackmun, J., dissenting). By 1989, it had become clear that the savings and loan industry was in dire trouble and emergency legislation was required to restore public confidence in the industry. H.R. Rep No. 54(I) at

90, 98-104. With respect to the extended statute of limitations provision contained in Section 212(d)(14) of FIRREA, codified at 12 U.S.C. § 1821(d)(14), Senator Reigle explained:

> Section 212 of the conference bill provides for extended statute of limitations p[illegible]ds for claims brought by the FDIC in its capacity as conservator or receiver of a failed financial institution. Although these provisions have attracted little attention from the media, they are of the utmost importance. Extending these limitations periods will significantly increase the amount of money that can be recovered by the Federal Government through litigation, and help ensure the accountability of the persons responsible for the massive losses the Government has suffered through the failures of insured institutions. *The provisions should be construed to maximize potential recoveries by the Federal Government by preserving to the greatest extent permissible by law claims that would otherwise have been lost due to the expiration of hitherto applicable limitations periods.*

135 Cong. Rec. S10182-01 at S10205 (Daily ed. Aug. 4, 1989) (emphasis added). Thus, it is clear that the mischief to be remedied was to avoid massive losses to the Government by maximizing the amount of money that could be recovered by the FDIC.

It is further clear that Congress contemplated using the private sector to maximize the amount of money that could be recovered by the FDIC. One of the purposes of FIRREA itself is to "provide funds from public and private sources to deal expeditiously with failed depository institutions." FIRREA, Section 101(8), para. 2101.

Those funds are provided from private sources through the purchase of assets from FDIC under purchase and assumption or bulk sale transactions. *See e.g.*, Sharp, *supra*, at 66.

CONCLUSION

For these various reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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NO. 94-126

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

LEE WEATHERLY,

Petitioner,

v.

FEDERAL DEBT MANAGEMENT, INC.

Respondent.

BRIEF OF BETH LILLIE AS AMICUS CURIAE SUPPORTING PETITIONER LEE WEATHERLY AND THE TEXAS FOUR-YEAR STATUTE OF LIMITATIONS

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83 pp

QUESTION PRESENTED

I. Under FIRREA, does public policy justify the extension of the FDIC and RTC's six year statute of limitations to third party assignees when the purported reason for the public policy no longer exists, i.e., the RTC is no longer engaged in making outright sales of severely delinquent assets to third parties?

II. Under FIRREA, the six year statute of limitations is extended to the FDIC and RTC. The statute is a comprehensive statutory scheme and is silent as to the rights of third party assignees. Under *O'Melveny & Myers v. Federal Deposit Insurance Corporation*, 114 S.Ct. 2048 (1994), does the state statute of limitations apply to loans in the hands of third party assignees?

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(Ten copies of the RTC document referenced in the Appendix have been lodged with the Clerk of the Supreme Court of the United States)

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LIST OF ABBREVIATIONS

Federal Deposit Insurance Corporation ..... FDIC

Resolution Trust Corporation ..... RTC

Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ..... FIRREA

Case No. 93-1414 approved by RTC on June 29, 1993, Executive Committee Decision Memorandum ..... Memorandum

Judgments, Deficiencies and Charge-Offs ..... JDCs

A new plan or program recently implemented by the RTC pursuant to the Memorandum for the disposition and collection of JDCs, as well as other small balance non-performing assets ..... JDC Program

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

LEE WEATHERLY,

Petitioner,

v.

FEDERAL DEBT MANAGEMENT, INC.

Respondent.

BRIEF OF BETH LILLIE AS AMICUS CURIAE SUPPORTING PETITIONER LEE WEATHERLY AND THE TEXAS FOUR-YEAR STATUTE OF LIMITATIONS

Beth Lillie submits this Brief as Amicus Curiae supporting Petitioner *Lee Weatherly* and the application of the Texas four year statute of limitations to third party assignees of the FDIC and RTC.

STATEMENT OF INTEREST OF BETH LILLIE AS AMICUS AND PRELIMINARY STATEMENT

Beth Lillie has a significant interest in the issues presented to the Court because she is one of the many thousands of citizens whose alleged obligation is now in the hands of a third party assignee, and one of the thousands who could be significantly harmed if the FDIC and RTC's six year statute of limitations is transferrable. This brief is intended to bring relevant matters to the attention of the Court that have not already been brought to its attention by the parties; specifically, these matters should rebut any argument for the creation of special federal rules, erroneously based on federal interest, to extend the six year statute of limitations to assignees of the FDIC and RTC.

There is no federal policy or interest to justify the transfer of the FDIC and RTC's six year statute of limitations under FIRREA to assignees; nevertheless, the Texas Supreme Court has erroneously created a special rule extending 12 U.S.C. §1821(d)(14) to assignees based upon non-existent public policy. The only beneficiaries of such precedent are the assignees who have already purchased loans from the FDIC and RTC. The issue is moot as to any future sales because the RTC has discontinued outright sales of its severely delinquent assets (known as JDCs). Such sales are contrary to Congress' stated intent. The federal government and U.S. taxpayer will not benefit. **The losers will be the many thousands of citizens who must deal with the unjust and costly harassment of third party assignees.**

The Texas four-year statute of limitations should control the ultimate disposition of *Federal Debt Management, Inc. v. Weatherly*, 37 Tex. Sup. Ct. J. 555 (March 9, 1994) because FIRREA is silent on the issue of assignment to third parties and under *O'Melveny & Myers v. Federal Deposit Insurance Corporation*, 114 S.Ct. 2048 (1994), matters left unaddressed in comprehensive and detailed federal statutory scheme are presumably left subject to disposition provided by state law.

SUMMARY OF ARGUMENT

The Texas Supreme Court in *Weatherly*, and the U.S. Court of Appeals for the Fifth Circuit in *FDIC v. Bledsoe*, 989 F.2d 805 (5th Cir. 1993) have created a special federal rule transferring the FDIC and RTC's six year statute of limitations to purchasers of FDIC and RTC promissory notes under the guise of public policy and the common law of assignments. The common law of assignments does not apply to matters reserved to the sovereign, and no genuine public policy exists. Consequently, this Court's intervention is needed to prevent the proliferation of law based upon assumed public policy.

The lower courts have been lead to believe by third party purchasers of severely delinquent loans, and by misinformed FDIC and RTC counsel, that if 12 U.S.C. §1821(d)(14) is not extended, the market value of notes and other assets in the hands of the FDIC [or RTC] would diminish, hindering [the] statutory purpose. *See Federal Debt Management, Inc. v. Weatherly 37 Tex. Sup. Ct. J. at 557.* Further, they argue that it would only serve

to shrink the private market for such assets. *See Fall v. Keasler, 1991 WL 340182, at 4 (N.D. Cal. Dec. 18, 1991).* As this brief will demonstrate, these arguments are not only erroneous but are now moot.

ARGUMENT

The RTC is an instrumentality of the United States owned by the FDIC and was created pursuant to FIRREA. It is charged with carrying out Congress' intent. 12 U.S.C. §1441a(b)(4) makes 12 U.S.C. §1821(d)(14) applicable to the RTC.

The attached *Appendix* contains true and correct excerpts of a certified copy of RTC Executive Committee Decisional Memorandum, Resolution/Control No. 93-1414, as approved on June 29, 1993 by the RTC Executive Committee (the "Memorandum"). The Memorandum is a public record of which this Court may take judicial notice.[1]

By approving the Memorandum, the RTC made a significant change in its disposition policy, i.e., it decided to discontinue outright sales of severely delinquent assets to third parties, in favor of retaining an interest in the assets and their proceeds using limited partnerships. This policy change should eliminate any notion that the disposition of RTC assets will be prejudiced if the six year statute of limitations is not extended to purchasers of FDIC and RTC assets.

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[1]Ten copies of the Memorandum have been lodged with the Clerk of the Supreme Court of the United States.

I. Public policy arguments for extending the six year statute of limitations are now moot since the RTC has abandoned outright sales of severely delinquent assets.

The subject of the Memorandum is the creation of a new plan or program involving limited partnerships for the disposition and collection of judgments, deficiencies and charge-offs ("JDCs"), as well as small balance non-performing assets ("JDC Program"). Substantially all of the RTC's remaining assets in immediate jeopardy of being time barred by state statutes of limitations are among the assets placed in the JDC Program.

The RTC's mission statement, as provided in its Strategic Plan dated December 31, 1989 and approved by Congress, provides, in pertinent part, that the RTC will dispose of residual assets in a manner that will maximize return and minimize loss.

Recent sales of JDCs have generated minimal net proceeds of "less than 1% of the JDCs' principal amount". *See Appendix at page A-1.* Obviously, outright sales of JDCs have failed to maximize proceeds to the RTC, thus the RTC has abandoned such sales. It must logically follow that if sales to third parties of severely delinquent assets have been discontinued and are not in the RTC's best interest, then no federal policy or justification for extending the six-year statute of limitations to third party assignees exists and the issue is now moot.

The FDIC and RTC's alternative to selling severely delinquent assets, as acknowledged in *FDIC v. Bledsoe*,

989 F.2d 805 (5th Cir. 1993), is to hold onto them and prosecute them on their own behalf. This is precisely what the RTC has determined is the right thing to do by retaining an interest in a pool of JDCs that allows the RTC to participate in the recoveries. *See Appendix at page A-2.* The JDC Program structure has been determined to be more advantageous than outright sales. *See Appendix at page A-2.*

FIRREA is a comprehensive and detailed federal statutory scheme that is silent as to whether third parties should benefit from the six year statute of limitations specifically reserved to the FDIC and RTC under 12 U.S.C. §1821(d)(14). Matters left unaddressed in comprehensive and detailed federal statutory scheme are presumably left subject to disposition provided by state law, *O'Melveny & Myers v. Federal Deposit Insurance Corporation*, 114 S.Ct. 2048 (1994).

There is no clear evidence of legislative intent to support the extension of 12 U.S.C. §1821(d)(14) benefits to third party assignees, nor is there any current federal policy or interest. Consequently, state statutes of limitations should apply to loans that have been purchased from the FDIC and RTC by third parties.

Implementation of the JDC Program means that the only conceivable beneficiaries of granting the extension of 12 U.S.C. §1821(d)(14) to assignees, would be assignees who already own notes formerly owned by the FDIC or RTC. Neither the federal government or U.S. taxpayer will benefit from such an outcome. Therefore, the public policy argument relied upon by the Supreme

Court of Texas in *Weatherly* and the Fifth Circuit in *Bledsoe* is incorrect, moot, contrary to Congress' stated intent, and contrary to public policy.

II. Extension of the FIRREA six year statute of limitations to assignees would provide legal precedent for transferring other FIRREA rights to assignees.

The RTC's mission statement provides, in pertinent part, that the RTC will dispose of assets in a manner that will minimize the impact on local real estate and financial markets.

Extending the FIRREA six year statute of limitations to assignees would also create legal precedent for extending other FIRREA rights that should only be reserved to the sovereign. If other FIRREA rights are extended by such precedent, local real estate and financial markets could be significantly damaged, contrary to Congress' stated intent.

A holding that the FIRREA six-year statute of limitations is a right that is transferable to third party assignees creates legal precedent for transferring other rights reserved only to the sovereign by FIRREA. For example, 12 U.S.C. §1825(b)(2) and (3), of FIRREA, provides as follows:

> "(b) When acting as a receiver, the following provisions shall apply with respect to the Corporation: (2) No property of the Corporation shall be subject to levy, at achment, garnishment,

> foreclosure, or sale without the consent of the Corporation, nor shall any involuntary lien attach to the property of the Corporation; (3) The Corporation shall not be liable for any amounts in the nature of penalties or fines, including those arising from the failure of any person to pay any real property, personal property, probate, or recording tax or any recording or filing fees when due."[2]

If 12 U.S.C. §1825(b)(2) and (3) were extended to assignees of RTC and FDIC real property, then one of the greatest incentives for owners of such assets to pay their taxes, mortgages, interest and penalties timely, i.e., threat of foreclosure and penalties, would vanish. Hundreds of millions of dollars in budgeted tax revenues would likely be lost or deferred, causing significant harm to state and local taxing authorities.

CONCLUSION

The statute of limitations establishes a deadline after which the defendant may legitimately have peace of mind; it also recognizes that after a certain period of time it is unfair to require the defendant to attempt to piece together his defense to an old claim. *Walker v. Armco Steel Corp.*, 446 U.S. 740, 751 (1980). They are practical

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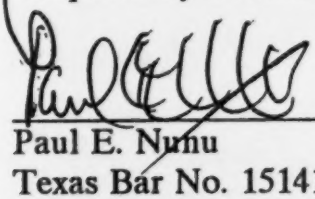
[2]Corporation is defined as the FDIC, however, 12 U.S.C. §1441a(b)(4) and §1823(d)(1)(A), extend certain privileges of the FDIC to the RTC.

and pragmatic devices to spare the courts from litigation of stale claims, and the citizens from being put to his defense after memories faded, witnesses have died or disappeared, and evidence has been lost. *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 314 (1945) citing *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348-349 (1944).

FIRREA is a comprehensive statute with a comprehensive provision regarding state statutes of limitations. If Congress had intended for third party assignees to enjoy the benefits reserved in the FDIC and RTC, it could have easily included statutory language addressing the matter. Therefore, based upon *O'Melveny*, the Texas four year statute of limitations should control.

For the various reasons provided herein, and the reasons provided in *Weatherly's* Petition for writ of certiorari, *Weatherly's* petition for writ of certiorari should be granted.

Respectfully submitted,



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APPENDIX

APPENDIX

Excerpt from RTC Executive Committee Decisional Memorandum, Resolution/Control No. 93-1414, (ten (10) copies of which have been lodged with the Clerk of the Supreme Court of the United States) at Case: Page 3:

"**BACKGROUND**

The RTC has been disposing of most of its Assets through auctions or competitive sealed bid sales. While these sales give the RTC an expeditious and efficient means of disposition, they have not enabled the RTC to participate in the substantial proceeds that are expected to be realized by active collection efforts on the Assets.

To allow RTC to participate in the expected upside of JDC collections, RTC plans to place its remaining inventory of JDCs and other small-balance non-performing assets into limited partnerships. Large auctions or sealed bid sales of JDCs are not expected to maximize proceeds to the RTC because of the lack of market depth to absorb quickly the RTC's large volume of JDCs at competitive pricing. This is evidenced by recent auction results (e.g., the $800 million JDC auction in Atlanta held on December 10, 1992, where RTC received, after expenses, **less than 1% of the JDCs' principal amount.**) Given the rapidly

decreasing time frame to collect on the Assets prior to the expiration of the statutes of limitations governing their collectibility, the RTC needs to proceed in an expedited fashion." [emphasis added]

Excerpt from RTC Executive Committee Decisional Memorandum, Resolution/Control No. 93-1414, (ten (10) copies of which have been lodged with the Clerk of the Supreme Court of the United States) at Case: Page 4:

"**RATIONALE FOR A LIMITED PARTNERSHIP STRUCTURE WITH A SHARING OF THE COLLECTION PROCEEDS**

A limited partnership will be utilized to place pools of JDCs under the management of a number of private sector entities serving as General Partners, so that collection efforts can be initiated with limited additional cost to the RTC.

This structure is more advantageous than either outright sales or a collection company contract for the following reasons:

+ Recoveries are highly uncertain. To reflect the substantial unknown risks, JDCs are deeply discounted when they are sold. **Retention of an interest in a pool of JDCs**

allows the RTC to participate in the recoveries. The Financial Advisor to the RTC for the JDC Program, Financial Conservators, Inc. ("FCI"), advises that the aggregate collections on the JDCs may total 5% to 10%. If RTC receives 45% to 50% of the collection proceeds*, then RTC could reasonably expect to receive proceeds that exceed the net proceeds normally received from sales of JDCs.

* The percentage of proceeds paid to RTC will vary within 5% based upon Bids received. The Financial Advisor expects most Bids to come in at 50% for JDCs.

If, for example, the partnerships collect an aggregate of 5% on $8 billion (principal amount) of JDCs, or $400 million, the RTC would receive proceeds of approximately $200 million (less RTC's portion of Permitted Partnership Expenses). If RTC instead sold the assets and netted, after expenses, less than 1% (based on the recent auction results), RTC would have received less than $80 million.

+ RTC, through its JDC Program Coordinators in the field offices, is compiling an inventory of the JDCs. Unlike prior JDC sales, RTC will not incur any due diligence expenses in preparing the JDCs

for the JDC program. While RTC plans to retain a firm to monitor the activities of each partnership, the RTC will not incur the other major expenses often incurred from the sale of a portfolio of JDCs (e.g., compensation of auction firm, imaging or other preparation of the documents for the sale, rental of storage space or auction room).

+ Outright sales of JDCs typically involve both due diligence by a third-party firm in preparation for the sale and a period of due diligence by interested investors. In the JDC Program, the time involved in this process will be eliminated.

+ Using multiple small limited partnerships, the RTC can achieve its primary objective of obtaining the most attractive pricing, while encouraging participation by MWOBs and small investors.

+ Under the alternative possibility of contracting with collection companies, RTC would incur additional costs of performing due diligence and preparing the Assets for collection efforts.

+ By maintaining ownership, RTC would have a greater potential legal liability exposure from the activities related to the collection efforts.

+ In the proposed limited partnership, the Assets are immediately placed into the control of private industry for appropriate legal and ethical collection efforts." [emphasis added]